(28)

No. 06-427
Title: Tennessee Secondary School Athletic Association, Petitioner
v.
Brentwood Academy
Docketed: September 26, 2006
Lower Ct: United States Court of Appeals for the Sixth Circuit
Case Nos.: (03-5245, 03-5278)
Decision Date: March 17, 2006
Rehearing Denied: June 27, 2006
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Sep 25 2006	Petition for a writ of certiorari filed. (Response due October 26, 2006)
Oct 4 2006	Order extending time to file response to petition to and including November 27, 2006.
Oct 13 2006	Order further extending time to file response to petition to and including November 30, 2006.
Oct 20 2006	Consent to the timely filing of amicus briefs in support of either party received from counsel for the petitioner.
Nov 29 2006	Brief amici curiae of Michigan High School Athletic Association, et al. filed.
Nov 30 2006	Brief amicus curiae of National Federation of State High School Associations filed.
Nov 30 2006	Brief amici curiae of Colorado High School Activities Association, et al. filed.
Nov 30 2006	Brief of respondent Brentwood Academy in opposition filed.
Dec 12 2006	Reply of petitioner Tennessee Secondary School Athletic Association filed.
Dec 13 2006	DISTRIBUTED for Conference of January 5, 2007.
Jan 5 2007	Petition GRANTED.
Feb 5 2007	SET FOR ARGUMENT ON Wednesday, April 18, 2007.
Feb 15 2007	Brief amici curiae of Arizona Interscholastic Association, Inc. et al. filed.
Feb 19 2007	Brief amicus curiae of National Collegiate Athletic Association filed.
Feb 20 2007	Joint appendix filed.
Feb 20 2007	Brief of petitioner Tennessee Secondary School Athletic Association filed.
Feb 20 2007	Brief amicus curiae of United States filed.
Feb 20 2007	Brief amicus curiae of National School Boards Association filed.
Feb 20 2007	Brief amicus curiae of National Federation of State High School Associations filed.
Feb 20 2007	Brief amici curiae of Boyd-Buchanan School, et al. filed.
Mar 5 2007	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Mar 8 2007	CIRCULATED.
Mar 15 2007	Record received from U.S.C.A. for 6th Circuit. (1 binder)
Mar 21 2007	Consent to the filing of amicus briefs in support of either party received from counsel for the respondent.
Mar 26 2007	Brief amici curiae of National Women's Law Center, et al. filed. (Distributed)
Mar 27 2007	Brief of respondent Brentwood Academy filed. (Distributed)
Mar 27 2007	Brief amicus curiae of Bridges Academy, Nashville Tennessee filed. (Distributed)
Mar 27 2007	Brief amici curiae of Brentwood Academy Parents, et al. filed. (Distributed)

Mar 27 2007	Brief amici curiae of Roman Catholic Diocese of Nashville, Tennessee and Father Ryan High School filed. (Distributed)
Mar 27 2007	Brief amicus curiae of Association of Christian Schools International filed. (Distributed)
Mar 27 2007	Brief amicus curiae of Institute for Justice filed. (Distributed)
Mar 27 2007	Brief amici curiae of National Association of Independent Schools, et al. filed. (Distributed).
Mar 27 2007	Brief amici curiae of National Alliance for Public Charter School, et al. filed. (Distributed).
Mar 27 2007	Brief amicus curiae of Tennessee Lawyers' Association for Women filed. (Distributed).
Mar 27 2007	Brief amici curiae of Center for Education Reform and Excellent Education for Everyone filed. (Distributed)
Apr 2 2007	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Apr 6 2007	Motion of Association of Christian Schools International (ACSI) for leave to participate in oral argument as amicus curiae and for divided argument filed.
Apr 10 2007	Opposition of petitioner to motion of ACSI for leave to participate in oral argument as amicus curiae and for divided argument.
Apr 11 2007	Reply of ACSI to petitioner's opposition filed.
Apr 11 2007	Reply of petitioner Tennessee Secondary School Athletic Association filed. (Distributed)
Apr 13 2007	Motion of Association of Christian Schools International for leave to participate in oral argument as amicus curiae and for divided argument DENIED.
Apr 17 2007	Record received from U.S.D.C. Middle District of Tennessee (Nashville). (5 boxes)
Apr 18 2007	Argued. For petitioner: Maureen Mahoney, Washington, D.C.; and Dan Himmelfarb, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.) For respondent: James F. Blumstein, Nashville, Tenn.

Supreme Court, U.S.
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(1)

No. 06-427

In the Supreme Court of the United States

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION,
PETITIONER,

v.

BRENTWOOD ACADEMY,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Tennessee Secondary School Athletic Association is a voluntary association, composed primarily of public schools, which adopts rules governing athletic competition between its members. Brentwood Academy is a private school that voluntarily chose to join TSSAA and agreed to abide by its rules, but now claims a First Amendment right to continue competing while violating TSSAA's rule against the use of "undue influence" in recruiting students for athletic purposes. The Sixth Circuit agreed, reasoning that Brentwood's voluntary agreement is irrelevant to the constitutional analysis and declining to recognize any substantial state interest in fair and level athletic competition. The question presented in this case is:

Whether the Sixth Circuit correctly held, in conflict with decisions of this Court and other courts of appeals, that TSSAA violated the First Amendment and Due Process rights of Brentwood Academy when it imposed contractual penalties for violations of the recruiting rule that Brentwood agreed to follow?

LIST OF PARTIES

In the court of appeals, the plaintiff/appellee was Brentwood Academy, and the defendants/appellants were the Tennessee Secondary School Athletic Association and its Executive Director, Ronnie Carter, both in his official and personal capacities.

RULE 29.6 STATEMENT

Petitioner Tennessee Secondary School Athletic Association does not have a parent corporation, and no publicly held company owns 10% or more of Tennessee Secondary School Athletic Association's stock.

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OPINIONS BELOW

The Sixth Circuit's earlier panel opinion is reported at 262 F.3d 543 (Pet. App. 1-24). The district court's opinion on remand is reported at 304 F. Supp. 2d 981 (Pet. App. 25-77). The Sixth Circuit's subsequent opinion is reported at 442 F.3d 410 (Pet. App. 78 -153).

JURISDICTION

The Sixth Circuit denied the Tennessee Secondary School Athletic Association's petition for rehearing and rehearing *en banc* on June 27, 2006 (Pet. App. 154-155). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The First Amendment to the Constitution provides that "Congress shall make no law ... abridging the freedom of speech." The Fourteenth Amendment to the Constitution provides that "No State shall ... deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

The Tennessee Secondary School Athletic Association's ("TSSAA") member schools have agreed that one of the rules for their high school athletic league should be a mutual agreement not to use "undue influence ... to secure or to retain a student for athletic purposes." Pet. App. 162-63.[1] High school athletic associations in every other state have similar rules, because there is a broad consensus among educators that recruiting for athletics harms students and undermines the educational purposes of high school sports. The recruiting rule also plays an important role in maintaining a fair and level playing field. It may limit "speech" in a sense, but so does the rule that a coach too vigorously protesting a referee's call will be ejected. Respondent Brentwood Academy voluntarily chose to join TSSAA and promised to respect its rules, and then

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[1] "Pet. App." refers to the petitioner's appendix filed in this Court. "CAJA" refers to the joint appendix filed in the court of appeals.

committed several clear and intentional violations of the recruiting rule. After TSSAA imposed a sanction, Brentwood initiated a decade of constitutional litigation claiming that its violations should have been treated as a case of "no harm, no foul." It claims, in essence, to have a constitutional right to compete in TSSAA-sponsored tournaments without following the rules that set the terms of competition, and victory, for others.

The Sixth Circuit found a constitutional violation only by making several serious errors that conflict with decisions of this Court and other courts of appeals, and merit review.

Factual Background

Interscholastic athletic competition requires a common set of rules to establish, define, and coordinate competition. TSSAA is a voluntary membership organization through which members self-regulate their sports competition and establish common rules to promote the educational ideals of interscholastic athletics. CAJA 119-120. TSSAA's members are predominantly public schools, *Brentwood Acad. v. TSSAA*, 531 U.S. 288, 291 (2001) ("*Brentwood I*"), but private schools that agree to abide by TSSAA's constitution and bylaws are also permitted to join. Not all schools in Tennessee subscribe to TSSAA's particular philosophy. Members have terminated their relationships with TSSAA to pursue different objectives, and many private schools in Tennessee join other athletic associations with different values and different rules. CAJA 868-71, 574.

TSSAA's authority over its members derives exclusively from each member's annual, voluntary decision to participate in TSSAA and comply with its bylaws by executing a membership contract. CAJA 871-72, 574. This Court has held that TSSAA is a "state actor" due to its "entwinement" with its public school members, *Brentwood I*, 531 U.S. at 298, but the Tennessee legislature has never delegated any legislative, judicial, or executive power to TSSAA, nor granted it any official authority. Neither the Tennessee State Board of Education nor the principals of

public schools—the sources of this Court's "entwinement" rationale—have any authority over Brentwood's athletic program except by virtue of Brentwood's voluntary membership contract with TSSAA.

Brentwood's Voluntary Participation in TSSAA

Respondent Brentwood Academy is a small private academy with a prominent athletic program. CAJA 118. Since joining TSSAA for the first time in 1972, Brentwood has won nine TSSAA state football championships, usually competing against much larger schools. CAJA 1154. Since the outset of this litigation, Brentwood has acknowledged that its relationship with TSSAA is contractual in nature. Brentwood's briefs to the district court invoked contract law and emphasized that "as a member of TSSAA, Brentwood Academy and other member schools have certain contract rights. Among those rights is the right to participate fully in the activities of the TSSAA unless there is some cause for a change in status." Brentwood Mem. at 60, No. 3:97-1249, Doc. No. 28 (M.D. Tenn. June 1, 1998).

Brentwood has likewise acknowledged that joining TSSAA is an entirely voluntary choice. CAJA 1406, 574. Brentwood Headmaster Emeritus Bill Brown testified:

> Q. And Brentwood Academy was not under any compulsion to join, it did so voluntarily, correct?
>
> A. Yes, sir.
>
> Q. All right. And when Brentwood Academy joined TSSAA, it agreed to abide by the rules and decisions of TSSAA, each year, right?
>
> A. Yes, sir.

CAJA 565. Current Headmaster Curt Masters agreed:

> Q. So you would agree with me that the decision of whether to join TSSAA or not join TSSAA each year is Brentwood Academy's decision to make, right?
>
> A. It is.
>
> *****
>
> Q. Now would you agree with me that if the public schools who predominate in TSSAA enact a set of

by-laws or rules to serve the public school mission, if Brentwood Academy's mission and those by-laws conflict, Brentwood Academy is free not to join those public schools in that association?

A. Yes.

CAJA 1406, 1410-11.

TSSAA's Recruiting Rule

TSSAA's bylaws contain a "recruiting rule" that prohibits "the use of undue influence ... to secure or retain a student for athletic purposes ...." Pet. App. 162-63. The bylaws contain several pages of guidelines that explain the rule's scope and application. *Id.* at 163-66. For example, the guidance warns that "a coach may not contact a student or his or her parents prior to his enrollment in the school," and cites as an example of prohibited conduct "any initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/athlete ...." *Id.* at 163-64. The guidance also defines "enrolled" as having "attended 3 days of school." *Id.* at 163-64. High school athletic associations in nearly every other state all have similar recruiting prohibitions.[2]

At trial, TSSAA gave three reasons for the rule: (1) preventing the exploitation of children; (2) ensuring that athletics remain secondary to academics; and (3) fostering a level playing field among its participating schools. TSSAA's evidence confirmed the importance of all three objectives. The NCAA first began permitting sports recruiting in 1956, and witnessed a pattern of abuses as well as a growing chasm between academics and athletics. CAJA 1665, 1339. At trial, four nationally renowned experts confirmed that schools must guard against this sort of exploitation of children. CAJA 1732, 1750, 1564, 1658, 1338. Brentwood's own expert acknowledged that preventing exploitation of children was a compelling interest. CAJA 1205.

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[2] The public internet sites of the state athletic associations are compiled at http://www.nfhs.org/custom/member_associations/states.aspx

The rule also helps preserve the primacy of academics over athletics. CAJA 1564, 657, 706. Otherwise the ills that have befallen the system of elite athletics at Division I colleges will filter to the high school level. CAJA 1569, 1604, 1609, 1661, 1338, 1351. Even Brentwood Headmaster Emeritus Bill Brown conceded that athletic recruiting is contrary to the purposes of high school sports and education, and should be prohibited. CAJA 607, 614.

TSSAA's recruiting rule also helps ensure fair and balanced athletic competition. Many different types of schools have come together to compete through TSSAA, and the entire enterprise depends on the ability to establish a reasonably level playing field. The evidence demonstrated that TSSAA's recruiting rule is essential to achieving that goal. CAJA 1728, 1564, 1571, 1306, 1311, 1324, 1086, 1102. Brentwood Headmaster Emeritus Bill Brown acknowledged that the recruiting rule protects a level of fairness in athletic competition that otherwise could not exist. CAJA 605, 615. According to Brown, without rules to prevent athletic recruiting, non-public schools that are not restrained by geographic attendance zones or dependent on limited tax revenues would have unfair competitive advantages over public schools. CAJA 615. The recruiting rule is therefore necessary to enable public schools and non-public schools to compete fairly within the same organization. Both the perception and reality of fairness and competitive balance are essential to the educational goals of high school athletics. As TSSAA expert witness Jack Roberts testified:

> If you do not have a level playing field, the competition cannot be fair, you can only have hard feelings result. All who participate want a fair chance to succeed .... The team doesn't want to be humiliated week after week by teams that are much more loaded in talent and powerful. ... There won't be as many youngsters coming out for the team. When that happens, schools lose a tremendous vehicle, sports, for reaching and motivating young people.

CAJA 1571-72.

Brentwood's Violation of the Recruiting Rule

In 1997, TSSAA received allegations about recruiting misconduct by individuals associated with Brentwood. CAJA 1025, 1437. Between May 30 and July 29, 1997, TSSAA Executive Director Ronnie Carter exchanged a series of letters and phone calls with Brentwood head football coach Carlton Flatt and Headmaster Brown about Brentwood's violations of TSSAA bylaws, and Carter and one of his assistants met personally with both Flatt and Brown. CAJA 1839, 1842, 1851, 1861, 1868, 618. On July 15, 1997, Brentwood provided TSSAA a copy of a letter Coach Flatt had sent to a dozen eighth-grade boys enrolled at other middle schools inviting them to attend spring football practice at Brentwood. Brentwood acknowledged that Coach Flatt had followed up those letters with personal telephone calls to the home of each boy. CAJA 1872, 1131. The boys had indicated an intention to attend Brentwood the next fall, but were not yet "enrolled" at Brentwood as defined in the bylaws. Every year some students change their minds before matriculating. CAJA 561-63, 582-84, 591.

The proof at trial was overwhelming that the invitation to spring practice was a recruiting endeavor that would tend to unduly influence the boys who received it. CAJA 1741, 1576, 1673, 1345, 1064. With the letter's references to "Your Coach" and "your new team," Coach Flatt effectively treated twelve boys as his own players, even though they were not yet Brentwood students. Flatt's implication that it would be in the child's best interest to attend spring practice sent the message that playing in the future depended on attendance at Brentwood's spring practice, even though the students were then enrolled at other schools. CAJA 1577, 1347. Such suggestions tend to have great effect because of the influence that coaches have on young student athletes. CAJA 1166, 1741. Coach Flatt himself acknowledged the coercive effect his letters had on the boys to whom they were sent. CAJA 1171-72.

Brentwood also provided TSSAA with information about Coach Flatt's provision of free tickets to a middle

school football coach that were in turn used by two prominent middle school athletes to gain free admission to a Brentwood football game, as well as information about violations of the TSSAA limit on off-season practice. CAJA 1138, 1851, 1150. Brentwood also responded to TSSAA requests for information about alleged Brentwood booster Bart King's contacts with potential Brentwood recruits. CAJA 1840, 1843, 1853-54, 1863, 1871, 1873-74.

TSSAA's investigation and adjudication complied with the procedures established in its constitution and bylaws and agreed upon by all members. The constitution provides that a school charged with violating TSSAA regulations "shall be notified of such charges," and "if a hearing is desired by the school involved ... [p]rovisions will then be made for such hearing." Pet. App. 156. Moreover, the constitution ensures that "a member school shall not be suspended from membership without first being given the opportunity to present its case at a hearing ... [which] shall be conducted by the Executive Director in the presence of two or more members of the TSSAA Board of Control." *Id.* at 157. Finally, "any decision of the Executive Director may be appealed to the Board of Control." *Id.*

On July 29, 1997, Executive Director Carter made an initial determination that Brentwood had violated the recruiting rule and the TSSAA limitation on off-season practice. That determination was based on all of the incidents discussed by the parties, including the activities of Mr. King. CAJA 1844. With the aid of counsel, and in accordance with TSSAA's bylaws, Brentwood then appealed to Carter and an advisory panel of three TSSAA Board of Control members. At this August 13, 1997 appeal, Brentwood presented sworn statements from witnesses and made a lengthy presentation that addressed each violation. CAJA 1152, 621, 1477-78, 2508, 2707. Following that hearing, Carter modified his initial decision. CAJA 1848.

Brentwood then pursued a *de novo* appeal under TSSAA bylaws to the entire TSSAA Board of Control on August 23, 1997. Again represented by counsel, Brentwood made a

lengthy presentation that included live testimony of witnesses and sworn statements addressing each violation. CAJA 2707, 3084. Brentwood's attorney presented an affidavit from Bart King and a sworn statement from a student, Jacques Curry, about Bart King. CAJA 2812-14, 2967-71, 1482-83. Brentwood's attorney also brought Mr. King in person to the hearing, but did not call him to testify. CAJA 1477, 1479. Brentwood's attorney acknowledged having had ample opportunity to prepare for the hearing, and testified that he was not prevented from presenting anything he wished to present. CAJA 1477-85.

After hearing Brentwood's arguments, the Board of Control issued a new and final decision. The Board of Control found that Brentwood: (1) violated the Recruiting Rule as a result of Coach Flatt's letters and calls; (2) violated the Recruiting Rule by giving free tickets to a Brentwood football game; and (3) violated the Practice Rule in boys' basketball. CAJA 1830. Each finding was based upon information that Brentwood supplied to TSSAA. The Board of Control placed Brentwood's athletic program on probation for four years, excluded the boys' basketball and football teams from TSSAA tournament playoffs for two years, and assessed a $3,000 "fine." (TSSAA bylaws do not provide a mechanism to compel payment. CAJA 867.)

Brentwood felt the punishment was too severe, and filed this lawsuit, alleging that the recruiting rule violated its First Amendment rights and that TSSAA's enforcement of the rule violated both substantive and procedural due process.

Proceedings Below

On July 29, 1998, the district court granted partial summary judgment to Brentwood. The district court held that the recruiting rule was unconstitutionally vague and was a content-based restriction on speech that failed strict scrutiny. *Brentwood Acad. v. TSSAA*, 13 F. Supp. 2d 670 (M.D. Tenn. 1998). The Sixth Circuit reversed, ruling that TSSAA did not act under color of state law. *Brentwood*

Acad. v. TSSAA, 180 F.3d 758 (6th Cir. 1999). This Court granted certiorari and reversed, concluding in a 5-4 decision that TSSAA was a state actor because of its "entwinement" with the State Board of Education and public schools. *Brentwood I*, 531 U.S. 288.

On remand to the Sixth Circuit, TSSAA argued that because of the contractual relationship between Brentwood and TSSAA, the *Pickering-Connick-Umbehr* line of cases, which governs retaliation against state employees or contractors because of speech, provided the appropriate analytical framework here. *See Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983); *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668 (1996). Under that standard, TSSAA insisted that Brentwood's speech was not on a matter of public concern, and that application of the recruiting rule to Brentwood was reasonable in light of the rule's legitimate objectives.

The Sixth Circuit disagreed. It held that the voluntary and contractual nature of the relationship between Brentwood and TSSAA was relevant only to waiver—and that Brentwood had not knowingly and specifically waived its right to file suit for a perceived violation of its First Amendment rights. Pet. App. 7-8. The court briefly considered the potential relevance of *Umbehr* and *Pickering*, but held that the recruiting rule should instead be analyzed as a "time, place, and manner" restriction on speech subject to intermediate scrutiny. It reasoned that because TSSAA must prove that its recruiting rule serves important governmental interests, *Pickering*'s requirement that the speech must be on a "matter of public concern" was satisfied by definition. *Id.* at 9. It then remanded for trial under intermediate scrutiny. *Id.* at 14-15, 21-23.

The district court conducted a ten-day trial, and entered judgment in Brentwood's favor on January 13, 2003. The court acknowledged TSSAA's important interests in preventing exploitation of children and keeping athletics secondary to academics, but held that TSSAA's interest in promoting a level playing field was not as important, Pet.

App. 48-49, and that enforcement of the recruiting rule against Brentwood's particular actions was not narrowly tailored. *Id.* at 49-55. The court also ruled that TSSAA violated Brentwood's due process rights. *Id.* at 65-71.

On appeal, a divided panel of the Sixth Circuit affirmed in all relevant aspects. Pet. App. 107, 119-20. The panel majority held that the "applicability of the First Amendment ... does not vary depending on ... whether the relationship between the government and the speaker is voluntary or contractual," *id.* at 94, and that the deferential analysis applied to the termination of public employees or contractors in cases like *Pickering* and *Umbehr* is limited to the particular types of contracts involved in those cases, *id.* at 91-93. It also treated this Court's distinction between "sovereign power" and "contractual power" in *Umbehr* as "dicta." *Id.* at 92-93. The panel held that TSSAA "can cite to no evidence to support the notion that ensuring that high schools compete in interscholastic sports in an equitable manner is a substantial state interest ...." *Id.* at 100. It agreed that "TSSAA had substantial state interests in keeping athletics subordinate to academics and preventing the exploitation of student athletes," *id.*, but held that "the TSSAA's use of its discretion to punish Brentwood for the letters and calls was not a narrowly tailored way to keep athletics subordinated to academics at Brentwood or ensure that the student athletes being contacted were not being exploited." *Id.* at 102. In addition, despite the evidence that Brentwood was fully aware of the issues involving Bart King and had received all the process it was due under its membership contract with TSSAA, the panel found a procedural due process violation because one member of TSSAA's Board testified that he considered the King matters in deciding on the penalty. *Id.* at 116-20.

Judge Rogers dissented, explaining that "[d]issatisfaction with application of game rules does not become a First Amendment violation merely because the rule involves speech." *Id.* at 132. Judge Rogers would have held that "Brentwood in this case gave up its right to

engage in certain types of speech," and noted that that waiver would have been respected in the Third, Fourth, and Ninth circuits. *Id.* at 134-36. He also explained that there was no "unconstitutional conditions" defect in Brentwood's agreement to abide by the recruiting rule, because that rule is reasonably related to the competitive athletic program overseen by TSSAA and because the "speech" in question—being purely a matter of private concern—clearly failed the *Pickering* test. *Id.* at 138-39. Judge Rogers also noted that the majority erred by second-guessing whether Brentwood's specific violation actually threatened the substantial state interests underlying that rule. "The anti-recruiting rules, like restrictions on an adult oriented business, operate in the aggregate and are judged based on the overall effect on speech; a city is not required to show that every cabaret affected by an ordinance causes an increase in crime and prostitution before the ordinance can be applied to that business." *Id.* at 144. Judge Rogers also disagreed with the majority's "remarkable" conclusion that competitive equity is not a substantial state interest: "it can hardly be argued that TSSAA needs to provide evidence for the obvious proposition that more evenly balanced high school football matches are in the public interest." *Id.* n.2. Finally, Judge Rogers explained that the district court and panel clearly erred by concluding that Brentwood's procedural due process rights were violated. *Id.* at 147-48.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's analysis is flawed in at least three respects, each of which conflicts with this Court's precedents and the law of other circuits, and merits review.

First, the Sixth Circuit wrongly held that TSSAA's voluntary recruiting rule should be analyzed just like any "time, place, and manner" restriction on speech imposed involuntarily on members of the general public. It held that the "applicability of the First Amendment ... does not vary depending on ... whether the relationship between the government and the speaker is voluntary or contractual."

Pet. App. 94. That is plainly incorrect. In *Snepp v. United States*, 444 U.S. 507 (1980), this Court enforced a CIA agent's voluntary agreement to submit any proposed writings to the agency for pre-publication review—a rule that if imposed on the general public would be a nakedly unconstitutional prior restraint. And in *Rust v. Sullivan*, 500 U.S. 173 (1991), and similar cases, this Court has held that the government may impose explicit conditions on the speech of voluntary participants in government programs, simply as a product of its right to control the limits and purposes of the program. Brentwood knew of this rule and voluntarily agreed to play by it, and the rule restricts Brentwood's "speech" only in the narrow context of its actual participation in the competitive athletic program it chose to join. That should be the end of the matter.

Even if Brentwood's specific voluntary agreement to abide by this rule were disregarded, this Court has held that when a state actor simply terminates its *contractual* relationship with a citizen because of that citizen's speech, First Amendment review is substantially more deferential than when the state exercises sovereign authority to punish speech with civil or criminal penalties. An employee or contractor who suffers termination or another contractual penalty because of speech has a First Amendment claim only if he spoke "as a citizen," "upon matters of public concern," and his interest in speaking is not outweighed by the government's interest in protecting the purposes and quality of its programs. *See, e.g., Umbehr*, 518 U.S. at 676; *Pickering*, 391 U.S. at 568. Several circuits have correctly held that when a voluntary association qualifies as a state actor, internal membership decisions raise constitutional concerns only if they violate the *Pickering* test. Brentwood cannot possibly succeed under that standard. The "speech" for which it was sanctioned here was delivered entirely in its capacity as a participant in the program administered by TSSAA, related solely to matters of private concern, and is not justified by any interest of Brentwood's sufficient to outweigh the undeniable need of TSSAA's member schools

to establish and enforce consistent rules for competition.

Second, even under its misguided "time, place, and manner" analysis, the Sixth Circuit improperly discounted the importance of TSSAA's interests. It held that TSSAA did not submit sufficient "evidence" to prove that promoting competitive equity is a "substantial" state interest. That holding is plainly wrong and in direct conflict with decisions of almost every other circuit and the highest courts of several states—all of which have recognized, without the need for evidentiary proof, that both the perception and reality of competitive equity are essential to the goals of interscholastic athletics. More broadly, the Sixth Circuit accepted two of TSSAA's substantial state interests for the recruiting rule but held that the rule should not have been enforced here because, in the court's substituted judgment, Brentwood's unambiguous violation was harmless. Second-guessing such judgment calls is not the business of a federal court. This Court has never required a government entity to prove that enforcement of a generally reasonable "time, place, and manner" restriction was justified by the particular facts of the case. And particularly in the athletic context, a referee or athletic association has a substantial interest in enforcing the agreed rules of a competitive endeavor *simply because they are the rules.* Referees sometimes look the other way when they believe that enforcement would not serve the rule's purposes, but no one has a constitutional right to such forbearance.

Third, the Sixth Circuit applied due process precedents developed in very different contexts to hold that the hearing TSSAA provided Brentwood was insufficient. That is incorrect and conflicts with the decisions of this Court and other circuits. The process Brentwood received was fully consistent with this Court's due process cases—and in any event was precisely the process it agreed to.

Finally, the Sixth Circuit's confusion illustrates why this Court's earlier decision in this case warrants reconsideration. *Brentwood I* created a new "entwinement" test for state action that lower courts and commentators

have repeatedly characterized as unworkable. It also involves the courts in the internal affairs of voluntary associations that do not threaten constitutional values.

On a practical level, there is no question that Tennessee has the right to decide how its own public schools will compete without any constitutional scrutiny. The real issue in this case is whether TSSAA (and its counterparts in all 49 other states and the District of Columbia) can continue to offer *private* schools like Brentwood the opportunity to participate in joint athletic tournaments on the condition that they agree to play by those same rules. Athletic associations like TSSAA are voluntary organizations funded by modest dues and ticket sales at high school tournament games. They do not have the resources for constitutional litigation or any incentive to risk it. This case alone—concerning a limited sanction for a clear recruiting violation—has dragged out for very nearly a decade. If allowed to stand, the Sixth Circuit's analysis will inevitably lead to the exclusion of private schools from associations like TSSAA. That will serve no one's interests.

I. THE SIXTH CIRCUIT'S FIRST AMENDMENT ANALYSIS IS WRONG AS A MATTER OF LAW AND CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS

A. The Sixth Circuit's Decision Fundamentally Misconceives First Amendment Doctrine

The Sixth Circuit treated TSSAA's recruiting rule just like a coercive "time, place, and manner" regulation of speech imposed by the State on the general public and subject to intermediate scrutiny, and held that the "applicability of the First Amendment ... does not vary depending on ... whether the relationship between the government and the speaker is voluntary or contractual." Pet. App. 94. That is incorrect. Conditions attached to voluntary government programs are always reviewed with substantially more deference than coercive speech restrictions imposed on the general public.

TSSAA's enforcement of its recruiting rule was not an exercise of sovereign power. TSSAA has no power at all over Brentwood other than the power that Brentwood has voluntarily given it by contract. Brentwood is subject to TSSAA's recruiting rule only because it voluntarily agreed to that rule when it chose to join TSSAA, and because it wants to continue competing in TSSAA's tournaments in the future. Private schools have plenty of other leagues and outlets for competition, in Tennessee and nationwide. Many Tennessee private schools do not belong to TSSAA. As this Court explained in *NCAA v. Tarkanian*, 488 U.S. 179, 199 (1988), abandoning its membership in the NCAA may have been a blow to UNLV's particular aspirations for athletic glory, "[b]ut that UNLV's options were unpalatable does not mean that they were nonexistent."[3] *Id.* at 198, n.19. TSSAA is simply offering a discretionary benefit to Brentwood on the condition that Brentwood agree to abide by the basic rules that define, make possible, and preserve the very benefit being offered. This Court recognized in *NCAA v. Bd. of Regents*, that an athletic league "would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition." 468 U.S. 85, 101-02 (1984). The "integrity" of such rules "cannot be preserved except by mutual agreement." *Id.* at 102.[4]

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[3] *See also Grabow v. Montana High Sch. Ass'n*, 312 Mont. 92, 98-99 (2002) ("While the consequences may weigh on a district's decision to withdraw from the MHSA, the district still remains free to do so."); *Robinson v. Kansas State High Sch. Activities Ass'n*, 260 Kan. 136, 149 (1996) ("The fact that all member schools must agree to obey the rules governing interscholastic competition, whether or not they individually agree with those rules, likewise does not establish involuntariness.").

[4] *See also Grabow*, 312 Mont. at 98 ("Competitive interscholastic athletics requires rules for competition."); *Robinson*, 260 Kan. at 149 ("The nature of interscholastic competition demands that there be a set of rules all competing schools are willing to abide by. ... [A] school wanting to compete in sports or other activities with other schools will agree to abide by the rules they all agree on -- whether each school may like or dislike a particular rule.").

That feature takes this case entirely outside of the "time, place, and manner" precedents relied on by the Sixth Circuit. First, the government is free to establish up-front conditions on participation in voluntary government programs, so long as the conditions are reasonable and germane to the purposes of the program. *See Grove City Coll. v. Bell*, 465 U.S. 555 (1984). In *Snepp*, for example, this Court rejected a First Amendment challenge to a pre-publication screening condition contained in a government employment contract. This Court did not analyze the condition as a "time, place, and manner" restriction; rather, it appropriately viewed the rule as a simple and reasonable condition of employment, voluntarily accepted at the outset. And in cases like *Rust*, this Court has held that the government may require that voluntary participants in government programs abide by reasonable restrictions on their speech within the contours of that program. *Rust*, 500 U.S. at 193. Individual participants do not have the right to change the basic character of a voluntary government program by participating in that program in a manner inconsistent with its purposes. Reasonable restrictions on speech *within the program* are unproblematic, so long as they are not intended to suppress particular ideas and do not "effectively prohibit[] the recipient from engaging in the protected conduct [or speech] outside the scope of the ... program." *Id.* at 196. Like the counselors in *Rust*, Brentwood is free to say anything that it likes on the subjects of high school sports, recruiting, or TSSAA in a wide variety of contexts. *See* Pet. App. 11-12 (Sixth Circuit listing the "numerous ways in which Brentwood can get its message about athletics out to prospective students"). But "speech" by which Brentwood recruits individual students for athletic purposes is not abstract social commentary—it is active participation in the competitive athletic program offered and overseen by TSSAA, just like a coach's on-the-field challenge to a referee's penalty call. TSSAA is entitled to insist that participation in its own program be conducted consistent with that program's rules and purposes. *Rust*,

500 U.S. at 193; *cf. Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006); *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 657 (1995) (voluntary participants in school athletics "have reason to expect intrusions upon normal rights and privileges").

Second, this Court has repeatedly held that the government may discipline or terminate any voluntary contractual relationship because of speech that disrupts the legitimate goals of that relationship. In such circumstances, review "must rest on different principles than review of speech restraints imposed by the government as sovereign." *Waters v. Churchill*, 511 U.S. 661, 674 (1994) (plurality). "[S]ubstantial weight" is given to the government's decisions as employer "even though when the government is acting as sovereign [this Court's] review ... is considerably less deferential." *Id.* at 673; *Umbehr*, 518 U.S. at 678 ("Deference is therefore due to the government's reasonable assessments of its interests *as contractor*.")

That principle applies across a broad spectrum of voluntary contractual relationships with the government. *Umbehr*, 518 U.S. at 680. The Sixth Circuit's observation that this "case does not involve the government as a party in a contractual relationship with an independent contractor" misunderstands this Court's broad holding in *Umbehr*. This particular contractual relationship may raise different issues than more typical government contracts cases, but—just as in *Umbehr*—there is no reason that the *Pickering* balancing test cannot accommodate such differences. *Id.* at 678. Brentwood is a party to a voluntary contract with the government, and is contending that it was punished within the confines of that contract for protected speech. It is *at most* entitled to the protection of the *Pickering* test.

To prevail under that test, a plaintiff must first prove that it spoke "as a citizen on a matter of public concern." If those threshold requirements are met, the court must balance the employee or contractor's interests, as a citizen, in speaking on matters of public concern against the government's interests in the programs it administers through its employees or contracts. *Pickering*, 391 U.S. at

568. Brentwood cannot possibly satisfy those standards. Brentwood was not speaking "as a citizen" in the relevant sense. This Court recently clarified that employees or contractors have *no* right to speak freely *while performing their job or contract functions*, and can be disciplined for such speech without First Amendment scrutiny. *Garcetti*, 126 S. Ct. at 1960. (That is, of course, a manifestation of the same principle animating *Rust* and its progeny: the government is entitled to define the purposes and limits of its own programs, and insist that participants abide by those limits within the confines of their participation). Recruiting eighth graders to play high school football also is not speech on any "matter of public concern." *See City of San Diego v. Roe*, 543 U.S. 77 (2004). The Sixth Circuit's holding that Brentwood's speech is automatically about a matter of public concern if the recruiting rule is supported by any substantial state interest confuses apples and oranges, and would write the "public concern" test out of the law entirely. Brentwood therefore fails the threshold conditions for protection under the *Pickering/Umbehr* test. Even if a balancing of interests were appropriate, TSSAA's substantial interests in this rule certainly outweigh Brentwood's interests in violating it.

Third, even if the Sixth Circuit's "time, place, and manner" lens were appropriate, its application of intermediate scrutiny was seriously flawed. The Sixth Circuit conceded that TSSAA's recruiting rule is generally justified by its substantial interests in protecting students and ensuring that athletics remain subordinate to academics. It held, however, that "there was no evidence to show that the punishment of Brentwood was justified due to the effect of Brentwood's actions on the children or the relative standing of academics and athletics at the school." Pet. App. 106. But TSSAA is entitled to enforce a constitutionally justified rule without regard to whether that particular violation actually threatened the reasons for the rule. This Court has always asked whether the rule itself is justified by substantial state interests—not whether

this particular plaintiff's violation was somehow harmless. In *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), this Court squarely rejected the argument that Ohio must prove that enforcement furthered the purposes behind the rule, holding that the state is not required to prove actual injury and that "the absence of explicit proof or findings of harm or injury [is] immaterial." *Id.* at 468; *see also Clark v. Cmty. For Creative Non-Violence*, 468 U.S. 288, 296-97 (1984) (validity of time, place, and manner regulation "need not be judged solely by reference to the demonstration at hand," and the government's interests in generally applying the regulation cannot be challenged by advocating for an exception); *Heffron v. Int'l Socy for Krishna Consciousness, Inc.*, 452 U.S. 640, 652-53 (1981) (same); *cf. City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). "Similarly, TSSAA is not required to demonstrate that each time it enforces the anti-recruiting rules it is stamping out the exploitation of student athletes or the bending of academics to the will of athletics for the anti-recruiting rules to be valid." Pet. App. 144 (Rogers, J., dissenting). No athletic association (or government agency) could function if every time it attempted to enforce its rules it bore the burden of proving why the purposes of the rule supported that enforcement.

Put another way, the Sixth Circuit essentially held that TSSAA's recruiting rule is overbroad, and that a somewhat narrower prohibition (one that would not reach Brentwood's conduct in this case) would be more appropriate. That misconceives the inquiry. A "time, place, and manner" regulation is valid "so long as [it] promotes a substantial government interest that would be achieved less effectively absent the regulation." *United States v. Albertini*, 472 U.S. 675, 689 (1985). As this Court recently clarified in *Rumsfeld v. Forum for Acad. & Instit. Rights, Inc.*, it does not matter if the regulation is overbroad in some respects relative to the interests it is designed to serve. "The issue is not whether other means ... might be adequate. That is a judgment for Congress, not the courts. It suffices that the

means chosen by Congress add to the effectiveness of military recruitment." 126 S. Ct. 1297, 1311 (2006) (citations omitted). And this Court's holding that TSSAA is a state actor because of its "entwinement" with the public schools also necessarily implies that TSSAA is entitled to the deference that this Court gives to educational judgments.[5]

This Court should grant review to untangle the serious misconceptions embedded in the Sixth Circuit's analysis. If this Court declines to grant review on the merits, however, petitioners respectfully suggest that this decision should be vacated and remanded in light of *Garcetti* and *FAIR*.

B. The Sixth Circuit's Holding Conflicts with Decisions of Other Circuits

The Sixth Circuit's decision is inconsistent with several lines of authority in the other courts of appeals.

First, consistent with this Court's decision in *Snepp* the Third, Fourth, Eighth, and Ninth Circuits have held that an explicit contractual commitment to limit one's own speech will be enforced. *See Paragould Cablevision, Inc. v. City of Paragould*, 930 F.2d 1310, 1315 (8th Cir. 1991); *Erie Telecomms. Inc. v. City of Erie*, 853 F.2d 1084, 1096 (3d Cir. 1988); *Lake James Cmty. Volunteer Fire Dep't. v. Burke County*, 149 F.3d 277, 280-82 (4th Cir. 1998); *Leonard v. Clark*, 12 F.3d 885, 890 (9th Cir. 1993); *cf. Metro E. Ctr. for Conditioning & Health v. Qwest Communs. Int'l*, 294 F.3d 924, 928 (7th Cir. 2002). Brentwood voluntarily agrees each

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[5] *See Hazlewood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (deferring to government regulation of speech in the educational context); *Bd. of Educ. v. Mergens*, 496 U.S. 226, 275 n.6 (Stevens, J., dissenting) ("A school's extracurricular activities constitute a part of the school's teaching mission, and the school accordingly must make decisions concerning the content of those activities.") (quotation omitted); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) ("The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board" not the federal courts.); *Bd. of Educ. v. Pico*, 457 U.S. 853, 909-10 (1982) (Rehnquist, J., dissenting) ("[A]ctions by the government as educator do not raise the same First Amendment concerns as actions by the government as sovereign").

year to abide by TSSAA's recruiting rule, and these circuits would hold Brentwood to its bargain. The Sixth Circuit held that any valid waiver of First Amendment rights must include a specific promise not to sue to challenge the speech restriction. Pet. App. 7-8. That requirement is not consistent with the cited cases (or with this Court's decision in *Snepp*). Brentwood may retain the right to file this lawsuit, but that does not mean its contract does not limit the substantive scope of its First Amendment claim.

Second, several circuits have recognized that the *Pickering/Umbehr* test applies to a broad spectrum of voluntary relationships with the government, in conflict with the Sixth Circuit's holding that it is limited to employees and contractors, narrowly conceived. Pet. App. 91. Those circuits would have rejected Brentwood's claim.

In the Second Circuit, *Pickering* was held to govern the expulsion of members from a voluntary 4-H club that was a "subordinate government agency" under state law. *Gorman-Bakos v. Cornell Coop. Extension*, 252 F.3d 545, 548 (2d Cir. 2001). If *Gorman* is distinguishable from this case, it is only because the plaintiffs there had a much stronger claim than Brentwood has here. They were expelled for speech that undermined the operations and objectives of the voluntary association, but unlike Brentwood they had not specifically promised in advance to refrain from that speech. *See also Rottmann v. Pa. Interscholastic Athletic Ass'n*, 349 F. Supp. 2d 922 (W.D. Pa. 2004) (applying *Pickering* in nearly identical circumstances to this case).

Other circuits have likewise applied *Pickering* beyond the employee or independent contractor context when the plaintiff was in a voluntary relationship with the government. The Seventh Circuit applied *Pickering* to expulsion of students from voluntary state-run ROTC programs. *Blameuser v. Andrews*, 630 F.2d 538 (7th Cir. 1980). Courts have also applied *Pickering* to the termination of volunteers from state-run voluntary

associations such as fire departments,[6] to the termination of licensees who were granted a contractual privilege,[7] and to cases in which a state actor refused to employ a person or do business with a prospective contractor on speech-related grounds.[8] *See also Blackburn v. City of Marshall*, 42 F.3d 925, 932 (5th Cir. 1995) ("[a]lthough the *Pickering/Connick* test arose in the context of public employment, courts have not strictly cabined its application"). Judge Rogers correctly noted in dissent in this case that "[t]here is no reason to limit the *Connick* no-public-concern analysis strictly to government employee cases," Pet. App. 138 and at least eight circuits agree.

II. COMPETITIVE EQUITY IS A SUBSTANTIAL STATE INTEREST

The Sixth Circuit held that TSSAA failed to prove that it has any substantial interest in fostering a level playing field among its member schools because TSSAA supposedly "cite[d] to no evidence to support the notion that ensuring that high schools compete in interscholastic sports in an equitable manner is a substantial state interest...." Pet App. 100. That ruling was essential to the outcome because the recruiting rule is obviously narrowly tailored to serve this interest. The panel did not suggest otherwise.

The panel's ruling is unprecedented and has far reaching implications. "[T]he very existence of a game to play, let alone a championship race to savor, requires that the participants cooperate off the field to create a fair and balanced match-up on the field." Paul C. Weiler, LEVELING

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[6] *Janusaitis v. Middlebury Volunteer Fire Dep't*, 607 F.2d 17 (2d Cir. 1979); *Versarge v. Twp. of Clinton*, 984 F.2d 1359 (3d Cir. 1993); *Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337 (4th Cir. 2000).

[7] *See Copsey v. Swearingen*, 36 F.3d 1336 (5th Cir. 1994); *Havekost v. United States Dep't of Navy*, 925 F.2d 316, 318 (9th Cir. 1991); *Smith v. Cleburne County Hosp.*, 870 F.2d 1375 (8th Cir. 1989); *Caine v. Hardy*, 943 F.2d 1406, 1415-16 (5th Cir. 1991) (*en banc*).

[8] *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997); *Worrell v. Henry*, 219 F.3d 1197 (10th Cir. 2000); *Kinney v. Weaver*, 367 F.3d 337 (5th Cir. 2004) (*en banc*).

THE PLAYING FIELD 2 (2000). Whenever people play competitive sports, they invariably devise eligibility or talent-spreading rules to ensure that competition is fair and no one team has an overwhelming advantage. Children on a playground alternate picking players for teams. All major professional sports leagues have a draft and restrictions on free agency, and many have salary caps or revenue sharing. All of these rules have as their primary purpose a desire to create and maintain competitive balance. *See, e.g., Wood v. Nat'l Basketball Ass'n*, 809 F.2d 954, 961 (2d Cir. 1987) (purpose of NBA salary cap and draft restrictions is "spreading talent among the various teams"); *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1175 (D.C. Cir. 1978) ("The NFL draft, like similar procedures in other professional sports, is designed to promote 'competitive balance.'").

Competitive equity and balance is similarly essential to the goals of high school athletics. TSSAA's constitution recognizes that "the primary objective of all secondary schools is to educate youth," and that "the athletic field and the gymnasium are classrooms in which teaching is foremost in the development of character, integrity, sportsmanship, and teamwork." CAJA 132. All those goals are undermined if student athletes perceive that the deck is unfairly stacked against them or that competition is futile, and become dispirited or cease participation. *See* CAJA 1571-72.

Perhaps the Sixth Circuit was confused by the "state action" posture of this case, because competitive equity in high school sports is not usually a significant preoccupation of state governments. But competitive equity surely and self-evidently *is* one of the central and important goals of any athletic league—and if high school athletic associations are to be treated as state actors then competitive equity must be recognized as an important *governmental* interest as well. The Sixth Circuit's allusion to a perceived lack of "evidence" is a red herring. As the dissent properly recognized, "the City of Renton need not provide evidence for the obvious proposition that crime increases are against the public interest, and New York in the *Ward* case need

not provide evidence that appropriate modulation of band concerts is in the public interest. Similarly, it can hardly be argued that TSSAA needed more evidence for the obvious proposition that more evenly balanced high school football matches are in the public interest." Pet. App. 144-45 n.2.

The Sixth Circuit's decision conflicts with several other circuits and the highest courts of several states, which have all recognized (without requiring any special evidence) that competitive equity is vital to interscholastic sports. The Eighth Circuit in *Pottgen v. Missouri State High Sch. Activities Ass'n*, 40 F.3d 926, 929 (8th Cir. 1994), held that a rule enforcing an age limit "helps reduce competitive advantage flowing to teams using older athletes," which was "of immense importance in any interscholastic sports program." The Third Circuit in *Smith v. NCAA*, 139 F.3d 180, 185, 187 (3d Cir. 1998), recognized that the NCAA's eligibility rules "primarily seek to ensure fair competition ... and allow for an even playing field." The Seventh Circuit upheld the NCAA's no-agent rules because they "preserve the honesty and integrity of intercollegiate athletics and foster fair competition among the participating amateur college students." *Banks v. NCAA*, 977 F.2d 1081, 1090 (7th Cir. 1992). None of these courts scoured the record for evidence that competitive equity is important. They accepted it as self-evidently important. *See also Chabert v. Louisiana High Sch. Athletic Ass'n*, 312 So. 2d 343, 346 (La. Ct. App. 1975) (finding that "illegal recruiting of promising young athletes is the gravamen of this recurring problem," and that "it is unarguable that any state has an interest in prohibiting such occurrences in its high schools"); *Cardinal Mooney High Sch. v. Michigan High Sch. Athletic Ass'n*, 467 N.W.2d 21, 25 (Mich. 1991) (upholding eligibility rule because it was "designed to rectify the competitive inequities that would inevitably occur if schools were permitted without penalty to field ineligible athletes"); *Law v. NCAA*, 134 F.3d 1010, 1023-24 (10th Cir. 1998) ("We note that the NCAA must be able to ensure some competitive equity between member institutions in order to produce a

marketable product: a 'team must try to establish itself as a winner, but it must not win so often and so convincingly that the outcome will never be in doubt, or else there will be no marketable 'competition.'") (citation omitted); *NCAA v. Lasege*, 53 S.W.3d 77, 86 (Ky. 2001) (the NCAA "certainly has an interest in the proper application of [its] regulations to ensure competitive equity"); *Washington v. Indiana High Sch. Athletic Ass'n*, 181 F.3d 840, 842, 844 (7th Cir. 1999) (recognizing "the public's interest in maintaining a level field of competition" and "competitive equality").

III. THE SIXTH CIRCUIT'S DUE PROCESS ANALYSIS IS FLAWED AND CONFLICTS WITH DECISIONS OF OTHER CIRCUITS

TSSAA's constitution and bylaws contain not only a set of rules but also a process for enforcing them and for resolving appeals or disputes. Brentwood voluntarily agrees each year to abide by TSSAA's rules, including its grievance procedures. In this context, Brentwood is not entitled to any more "process" than it voluntarily contracted to receive. *See, e.g., Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (due process is satisfied by arbitration if the employee agreed to arbitrate); *First State Ins. Co. v. Banco de Seguros Del Estado*, 254 F.3d 354, 357 (1st Cir. 2001) ("It was the method chosen by the parties to receive notice and therefore cannot be deemed to offend due process."); *Dominium Austin Partners, L.L.C., v. Emerson*, 248 F.3d 720, 726 (8th Cir. 2001) ("Due process is satisfied when a defendant consents to personal jurisdiction by entering into a contract that contains a valid forum selection clause.").

The Sixth Circuit did not even mention the contractual procedures to which the parties agreed, and its ruling that TSSAA somehow violated Brentwood's due process rights in the abstract conflicts squarely with the Seventh Circuit's decision in *Batagiannis v. W. Lafayette Sch. Corp.*, 454 F.3d 738 (7th Cir. 2006). In that case, a school superintendent argued that her due process rights were violated because the school board conducting her termination hearing had already pre-judged her, and the hearing was a sham. The

Seventh Circuit held that Batagiannis had no viable due process claim because she "received exactly what she had agreed to accept: a hearing by the school board. That's what ¶5.b of her contract specified; by signing, she waived any entitlement to a wholly neutral decision-maker." *Id.* at 741. Unquestionably, Brentwood's due process claim would be rejected under *Batagiannis* in the Seventh Circuit.

Of course in some contexts, such as the firing of a tenured public employee, there is a constitutional minimum floor of due process that parties cannot be required to waive. *See, e.g., Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985). But even if the same is true for high school athletics, the Sixth Circuit failed to recognize that the constitutional floor is not the same in all contexts. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). There is no reason for the federal courts to become deeply enmeshed in second-guessing the contractually agreed procedures for resolving athletic disputes. Certainly a player being ejected from a game for unsportsmanlike conduct is entitled to no process at all. The Sixth Circuit imported a standard from the tenured public employee cases requiring an "explanation of the employer's evidence," *Loudermill*, 470 U.S. at 546, but there is no reason that anything more than the "essential requirements" of "notice and an opportunity to respond" should apply to an athletic association enforcing its internal operating rules. *Cf. Wolff v. McDonnell*, 418 U.S. 539, 556 (1974) (due to "institutional needs and objectives," prisoners need not be informed in advance of evidence).

Finally, the Sixth Circuit was simply wrong as a matter of fact and law in holding that TSSAA's procedures were constitutionally deficient. Under *any* standard, TSSAA's procedures far exceed what is constitutionally required. The district court wrongly credited a statement that TSSAA considered *ex parte* evidence of recruiting violations by Brentwood booster Bart King, which as the dissent explains is clear factual error. Pet App. 147-48. Regardless it is undisputed that Brentwood's notice of the alleged violations included notice that King's activities were at

issue. CAJA 1844-47, 1839-43, 1851-54, 1861-65. It is also undisputed that Brentwood received a full formal evidentiary hearing, where it was represented by counsel and to which it even brought Mr. King. Pet. App. 68. The Sixth Circuit's real holding is that Brentwood was somehow entitled to advance notice of which of the fully disclosed concerns might be regarded as important by the decisionmaker in deliberations. No court has ever endorsed a standard like that, and it is completely unworkable.[9]

IV. THIS COURT SHOULD RECONSIDER ITS STATE ACTION HOLDING

The Sixth Circuit's confusion demonstrates why this Court should reconsider its state action analysis in *Brentwood I*. In that opinion, this Court discarded the traditional inquiry into the particular state *action* in addition to the status of the *actor*. The Sixth Circuit therefore looked purely at TSSAA's overall "entwinement" with the state, and was unable to recognize, for example, that the specific conduct complained of here was not an exercise of sovereign power but simply implementation of a voluntary contract. Put another way, enforcement of the recruiting rule "entailed functions and obligations in no way dependent on state authority." *Polk County v. Dodson*, 454 U.S. 312, 318 (1981). *Brentwood I's* exclusive focus on the status of the actor has now produced the incongruous result that a voluntary association of public and private actors "entwined" with the state has even less ability to enforce rules that its own members have voluntarily adopted than the state itself would have to enforce speech restrictions against its employees or contractors under *Snepp*, *Rust*, and *Umbehr*. The Sixth Circuit also was unable to understand how competitive equity could be a substantial *governmental*

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[9] For the reasons set forth, both the First Amendment and Due Process issues warrant review. In addition, Brentwood would remain a "prevailing party" eligible for a large and entirely unjustifiable attorneys' fee award at TSSAA's expense unless both rulings are reversed.

interest, even though it is a central purpose of the athletic associations that this Court has now deemed state actors.

Brentwood I was a break from this Court's precedents. *See Brentwood I*, 531 U.S. at 306 (Thomas, J., dissenting); *Blum v. Yaretsky*, 457 U.S. 991, 1005 (1982) (looking to "the specific conduct of which the plaintiff complains"). Lower courts have been confused by *Brentwood I*'s new "entwinement" doctrine, describing it as "labyrinthine," "nebulous," "vague," and a "freewheeling *gestalt* analysis."[10] The Second Circuit has held, in effect, that a state action claim can never be frivolous after *Brentwood I*. *Tancredi*, 378 F.3d at 230. Lower courts are even confused about how many different state action tests there are. *See Wang v. Blue Cross Blue Shield Ass'n*, 55 F. App'x 802, 803 (9th Cir. 2003) ("seven approaches to the issue"); *Keeling v. Schaefer*, 181 F. Supp. 2d 1206 (D. Kan. 2001) (four tests); *Sabeta v. Baptist Hosp. of Miami, Inc.*, 410 F. Supp. 2d 1224 (S.D. Fla. 2005) (three tests). Commentators have also been deeply critical of the decision. *See, e.g.*, John Fee, *The Formal State Action Doctrine and Free Speech Analysis*, 83 N.C. L. REV. 569, 587 (2005) (characterizing "entwinement" as "so malleable that no outcome is excluded ... artificial and incapable of principled application"); Alan R. Madry, Statewide School Athletic Associations and Constitutional Liability; Brentwood Academy v. Tennessee Secondary School Athletic Association, 12 MARQ. SPORTS L. REV. 365 (2001) ("incoherent," "ad hoc," and "rides against a strong contrary tide"); Michael L. Wells, *Identifying State Actors in Constitutional Litigation: Reviving the Role of*

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[10] *See, e.g., Leshko v. Servis*, 423 F.3d 337, 338 (3d Cir. 2005) ("labyrinthine"); *Kirtley v. Rainey*, 326 F.3d 1088, 1094-95 (9th Cir. 2003) ("vague"); *Tancredi v. Metro. Life Ins.*, 378 F.3d 220, 230 (2d Cir. 2004) ("nebulous"); *Crissman v. Dover Downs Entmt.*, 289 F.3d 231, 233 (3d Cir. 2002) ("little is straightforward"); *Willis v. Town of Marshall*, 293 F. Supp. 2d 608, 615 (W.D.N.C. 2003) ("anything but clear and consistent"), *rev'd in part on other grounds*, 426 F.3d 251 (4th Cir. 2005); *Gross v. Fond Du Lac Cty. Agric. Soc'y, Inc.*, 2005 U.S. Dist. LEXIS 19537, at *23 (E.D. Wis. Sept. 6, 2005) ("freewheeling *gestalt* analysis").

Substantive Context, 26 CARDOZO L. REV. 99, 125 (2004) ("the Court appears to have gone astray").

When this Court reconsiders a recent decision that "itself *departed* from ... prior cases – and did so quite recently," this Court does "not depart from the fabric of the law; [it] restore[s] it." *Adarand Constructors Inc. v. Pena*, 515 U.S. 200, 233-34 (1995) (op. of O'Connor, J.) (emphasis in original); *accord Helvering v. Hallock*, 309 U.S. 106, 119 (1940) (Frankfurter, J.) ("[*S*]*tare decisis* is ... not a mechanical formula of adherence to the latest decision"); *Payne v. Tennessee*, 501 U.S. 808, 835 (1991) (Scalia, J., concurring). *Brentwood I* was "decided by the narrowest of margins, over [a] spirited dissent[] challenging the basic underpinnings of th[e] decision[]." *Id.* at 829. And it is a very new decision that has not engendered any meaningful reliance. In such circumstances neither *stare decisis* nor the law of the case doctrine precludes reconsideration. *See Agostini v. Felton*, 521 U.S. 203 (1997) (overruling earlier decision at later stage of the same litigation).

V. THIS CASE RAISES ISSUES OF NATIONAL IMPORTANCE

This case has broad significance to the interscholastic sports and educational community, including the fifty-one high school athletic associations composed primarily of public schools, 17,346 member schools, and over 10 million participating students across the country. The entire enterprise of interscholastic athletic competition depends on clear and enforceable rules, and sometimes those rules must restrict speech or expressive conduct, ranging from recruiting limitations to ejecting a coach or player for unsportsmanlike conduct. As shown by the legions of athletic association cases on the books, high school sports can arouse tremendous passions and frequent litigation. This case alone has stretched for nearly ten years, with three trips to this Court, and three published decisions of the Sixth Circuit. High school athletic associations like TSSAA typically receive no state funding, and finance their operations through modest membership dues and gate

receipts at tournament games. They do not have the means to engage in continuous constitutional litigation,[11] and their (often volunteer) leaders do not have the incentive to accept serious risks of personal liability for constitutional violations lurking behind every effort to enforce compliance with agreed upon rules. Indeed, in this very case, Brentwood sued TSSAA's executive director Ronnie Carter in his individual capacity, and Mr. Carter escaped crushing personal liability only because of the Sixth Circuit's qualified immunity ruling—which may not be available to the next defendant in his position because of this case.

The Sixth Circuit's decision in this case threatens to unleash a wide array of litigation over rules that limit speech in the context of athletic or other competition. If the lower courts manage to navigate this Court's precedents correctly, cases brought by disappointed *public* schools will eventually be dismissed on the ground that state entities have no constitutional rights, and cases brought by public school coaches or teachers will eventually be dismissed under *Garcetti*. But the Sixth Circuit's ruling in this case creates an entirely different set of rules for private schools. Voluntary athletic associations composed primarily of public schools frankly do not need private school participation to flourish, and have no reason to allow it if their presence simply invites enterprise-threatening constitutional lawsuits and if the rules of fair play cannot be enforced equally. The best that can be hoped for from the Sixth Circuit's decision is, therefore, an end to private school participation in organizations like TSSAA.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

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[11] Kevin P. Braig, *A Game Plan to Conserve the Interscholastic Athletic Environment After LeBron James*, 14 MARQ. SPORTS L. REV. 343, 364-65 (2004) (noting that "[p]rior to the Supreme Court's decision in *Brentwood Academy*, the members of the high school athletic associations ... did not bear the economic cost of recruiting allegations").

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRENTWOOD ACADEMY, PLAINTIFF-APPELLEE

v.

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION; RONNIE CARTER, EXECUTIVE DIRECTOR AND INDIVIDUALLY, DEFENDANTS-APPELLANTS.

No. 98-6113.

Argued: July 19, 2001.
Decided: August 23, 2001.
Filed: August 23, 2001.

Before GUY, SUHRHEINRICH, and GILMAN, Circuit Judges.

OPINION

RONALD LEE GILMAN, Circuit Judge:

This case is before us on remand from the Supreme Court. Brentwood Academy, a private school and member of the Tennessee Secondary School Athletic Association (TSSAA), sued TSSAA pursuant to 42 U.S.C. § 1983 for the alleged violation of its First Amendment rights. Specifically, Brentwood challenges the constitutionality of TSSAA's "recruiting rule," which prohibits member schools from exerting "undue influence . . . to secure or retain a

student for athletic purposes." The district court granted summary judgment in favor of Brentwood, holding that the recruiting rule violates the school's First Amendment rights.

TSSAA appealed, arguing that it is not a state actor for the purposes of § 1983 and, in any event, that the recruiting rule does not run afoul of the First Amendment. We reversed the decision of the district court on the basis that TSSAA is not a state actor, and therefore not subject to suit under § 1983. The Supreme Court granted certiorari and disagreed with our opinion, holding that TSSAA is in fact a state actor. It then remanded the case back to us for further proceedings consistent with the Court's opinion.

We now turn to the merits of TSSAA's appeal. After considering the parties' supplemental briefs and hearing oral arguments regarding the recruiting rule, we conclude that the district court erred in granting summary judgment in favor of Brentwood. For the reasons set forth below, we therefore REVERSE the judgment of the district court and REMAND the case for further proceedings consistent with this opinion.

I. BACKGROUND

A. Factual background

Brentwood is a private school located in Brentwood, Tennessee that has historically placed a strong emphasis on athletics. In particular, the football team has been nationally ranked by *USA Today* and has won at least seven TSSAA state championships. Brentwood's basketball team is also well known in athletic circles.

TSSAA is an association comprised of public, independent, and parochial secondary schools from across the state of Tennessee, whose purpose is "to stimulate and regulate the athletic relations of the secondary schools in Tennessee." To that end, TSSAA has enacted a "recruiting rule" designed to place limits on the recruiting practices of

secondary schools in soliciting middle school student athletes to participate in secondary school athletics. The recruiting rule is found in Article II, Section 21 of the TSSAA Bylaws, and reads as follows:

> Section 21. The use of undue influence on a student (with or without an athletic record), his or her parents or guardians of a student by any person connected, or not connected, with the school to secure or to retain a student for athletic purposes shall be a violation of the recruiting rule.

Section 21 is comprised of not only the recruiting rule itself, but also the equivalent of two full pages of questions, answers, and guidelines that provide explanations, details, and examples of the types of conduct the recruiting rule prohibits. This commentary sets forth principles that aid the member schools in complying with the recruiting rule. For example, the first question provides the following information on what the term "undue influence" means:

> Q. How is undue influence interpreted in the recruiting rule?
>
> A. A person or persons exceeding what is appropriate or normal and offering an incentive or inducement to a student with or without an athletic record.

The third question explicitly prohibits coaches from initiating contact with students prior to their enrollment in a secondary school:

> Q. Is it permissible for a coach to contact a student or his or her parents prior to his enrollment in the school?
>
> A. No, a coach may not contact a student or his or her parents prior to his enrollment in the school. This shall apply to all students whether or not they have an athletic record.

The fourth question asks: "What are some of the guides used in determining whether there has been undue influence used which would result in a violation of the recruiting rule?" It then provides seven examples. The third example reiterates that the recruiting rule prohibits "any initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/athlete enrolled in any member school except where there is a definite feeder pattern." The seventh example specifically prohibits "admitting students to athletic contests free of charge where there is an admission being charged at the contest except where there is a definite feeder pattern involved with the school." The feederschool exemption is not applicable to Brentwood, because it has no feeder pattern with any school.

Several representatives of Brentwood met with Ronnie Carter, the Executive Director of TSSAA, on February 10, 1993. This meeting was held at the request of Brentwood for the purpose of clarifying what types of recruiting practices would be acceptable under the recruiting rule. Michael S. Peek, a lawyer for Brentwood, followed up with a letter on February 24, 1993 that was intended to confirm Brentwood's understanding of the numerous ways in which Brentwood could communicate with prospective students about its athletic programs without violating the recruiting rule.

In 1997, several coaches at other member schools complained to TSSAA that Brentwood had violated various TSSAA rules. Carter conducted an investigation of the complaints. On July 27, 1997, Carter wrote a letter to Brentwood outlining six alleged violations of TSSAA rules. Five violations related to the recruiting rule and one to the sports-calendar rule. Only the recruiting rule violations are at issue in this appeal.

The alleged recruiting rule violations arose from two incidents. The first incident occurred when Brentwood's

then Athletic Director and Head Football Coach, Carlton Flatt, provided free tickets to a middle school coach for a Brentwood football game. These tickets were then used by the middle school coach to take several of his students to attend the game. The second incident arose when Coach Flatt sent letters and made followup telephone calls in the spring of 1997 to students from other schools who had contractually agreed to attend Brentwood in the fall of 1998, but who had not themselves solicited any information regarding Brentwood's athletic program. Carter, on behalf of TSSAA, imposed a number of penalties on Brentwood for these violations.

Brentwood appealed the sanctions according to the two-step process set forth in the TSSAA Bylaws. Carter presided at the first step and reduced the sanctions as a consequence of the appeal. Brentwood next appealed to the full Board of Control of TSSAA, which at the time consisted only of public high school principals. A hearing was held on August 23, 1997. The Board of Control found that Brentwood had violated the recruiting rule by admitting student athletes free of charge to an athletic contest and by contacting middle school students while they were enrolled in other schools. As punishment, the Board fined Brentwood $ 3,000, placed its athletic program on probation for four years, and suspended Brentwood from participating in tournaments and conducting certain types of off-season practice for two years.

B. Procedural history

Brentwood filed suit against TSSAA in the United States District Court for the Middle District of Tennessee on December 12, 1997. It alleged that TSSAA was a state actor and that TSSAA's enforcement of the recruiting rule violated its First and Fourteenth Amendment rights. Brentwood also sought an injunction against TSSAA's enforcement of the recruiting rule. Faced with cross-motions for summary judgment, the district court

granted Brentwood's motion for summary judgment on its First Amendment claim and enjoined TSSAA from enforcing the recruiting rule.

TSSAA appealed the district court's grant of summary judgment in favor of Brentwood, arguing that (1) TSSAA is not a state actor, thereby rendering it immune from constitutional scrutiny, and (2) the recruiting rule in any case does not violate Brentwood's First Amendment rights. Our prior opinion did not reach the merits of TSSAA's challenge to the district court's First Amendment ruling because we concluded that TSSAA was not a state actor. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 180 F.3d 758 (6th Cir. 1999). Brentwood sought review of our decision by the Supreme Court, which granted certiorari. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 528 U.S. 1153, 145 L. Ed. 2d 1069, 120 S. Ct. 1156 (2000). The Supreme Court reversed our decision, holding that TSSAA is a state actor, and remanded the case to us for further proceedings consistent with its opinion. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 148 L. Ed. 2d 807, 121 S. Ct. 924 (2001). Before us now are the merits of TSSAA's appeal regarding the constitutionality of the recruiting rule.

II. ANALYSIS

A. Standard of review

We review de novo the district court's grant of summary judgment. *See, e.g., Holloway v. Brush*, 220 F.3d 767, 772 (6th Cir. 2000). Summary judgment is proper when there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In deciding a motion for summary judgment, the court must view the evidence and draw all reasonable inferences in favor of the nonmoving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). The judge is not to "weigh the evidence and determine the truth of the

matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). A genuine issue for trial exists only when there is sufficient "evidence on which the jury could reasonably find for the plaintiff." *Id.* at 252.

B. Brentwood has not waived its right to challenge the constitutionality of the recruiting rule

TSSAA now recognizes, as it must under the Supreme Court's ruling, that it is a state actor subject to constitutional challenges. It nevertheless argues that Brentwood has waived its right to question the constitutionality of the recruiting rule because, by voluntarily choosing to be a member of TSSAA, it has agreed to abide by the rules of the organization. TSSAA thus contends that Brentwood is faced with "the choice between joining TSSAA and complying with the rules or competing in interscholastic athletics as a nonmember of TSSAA."

The five cases that TSSAA cites to support its argument, however, are distinguishable from the case at hand. *See Town of Newton v. Rumery*, 480 U.S. 386, 94 L. Ed. 2d 405, 107 S. Ct. 1187 (1987) (holding that a criminal defendant can waive important constitutional rights by entering into a plea bargain); *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 31 L. Ed. 2d 124, 92 S. Ct. 775 (1972) (holding that where there is no unequal bargaining power or overreaching, debtors can voluntarily, intelligently, and knowingly waive due process rights by signing a cognovit note, which is an agreement by which a debtor consents in advance to a holder's obtaining a judgment without notice or hearing); *K.M.C. Co. v. Irving Trust Co.*, 757 F.2d 752, 758 (6th Cir. 1985) (concluding that when a party knowingly, voluntarily, and intentionally signs a jury waiver provision in a civil case, that party has waived its right to a jury trial); *International Union v. Dana Corp.*, 697 F.2d 718, 719 (6th Cir. 1983) (holding that a settlement agreement between

Dana and the union rendered an appeal moot, even though the agreement "effectively prevented Dana from communicating with its employees regarding [a union campaign] at one of Dana's subsidiaries"); *Lake James Cmty. Volunteer Fire Dep't v. Burke County*, 149 F.3d 277 (4th Cir. 1998) (concluding that an agreement between a volunteer fire department and the county that prohibited the fire department from suing the county was enforceable, even though it waived the fire department's constitutional right to petition the government).

The common legal thread among the above five cases is that they all involve parties that actually waived their right to sue. There is no comparable TSSAA provision prohibiting members from challenging the constitutionality of the recruiting rule. Moreover, Brentwood points out that what was once called the "bitter-with-the-sweet" doctrine has been replaced with the "unconstitutional conditions" doctrine. In the words of the Supreme Court:

> Recognizing that constitutional violations may arise from the deterrent, or chilling, effect of governmental [efforts] that fall short of a direct prohibition against the exercise of First Amendment rights . . . our modern unconstitutional conditions doctrine holds that the government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit.

Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 674, 135 L. Ed. 2d 843, 116 S. Ct. 2342 (1996) (internal quotation marks and citation omitted) (alterations in original).

Umbehr involved a § 1983 claim for unlawful retaliation brought against the county's governing body by an independent contractor who provided trash collection services to the county. The Court held that the contractor

had stated a cause of action based on the allegation that his contract was terminated in retaliation for his criticism of the county commission. *Umbehr* is an extension of the protections provided to public employees under the First Amendment. *See Pickering v. Bd. of Educ.*, 391 U.S. 563, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968) (holding that the board of education violated a school teacher's First Amendment rights by dismissing him because he had criticized the board in a letter to the local newspaper). We believe that the Supreme Court's rulings that parties do not give up First Amendment rights by contracting with, or being employed by, a public agency forecloses TSSAA's argument that Brentwood gave up its right to challenge the constitutionality of the recruiting rule because it voluntarily joined TSSAA.

TSSAA argues, however, that the First Amendment protection afforded by *Umbehr* and *Pickering* applies only when the content of a contractor's or employee's speech involves a "matter of public concern." *Umbehr*, 518 U.S. at 685; *see also Pickering*, 391 U.S. at 574. It claims that the recruiting rule does not implicate a matter of public concern, and is therefore unworthy of First Amendment scrutiny. But TSSAA cannot have it both ways. As set forth in Part II.F. below, TSSAA will have to establish that the recruiting rule embodies substantial governmental interests as a necessary element of the rule's enforceability. These substantial interests will by definition implicate a "matter of public concern." *See Pickering*, 391 U.S. at 573 (holding that issues involving the local board of education were "matters of public importance").

We therefore conclude that Brentwood has not waived its right to challenge the constitutionality of the recruiting rule by voluntarily joining TSSAA. This means that we must now reach the merits of the district court's First Amendment analysis of the recruiting rule.

C. The district court erred in holding that the recruiting rule is a content-based regulation for the purposes of First Amendment analysis

TSSAA's appeal broadly challenges the analytical framework that the district court used to determine the constitutionality of the recruiting rule. The primary contention of TSSAA is that the district court erred in concluding that the recruiting rule is a content-based regulation that fails strict scrutiny review. We agree.

A fundamental premise of First Amendment jurisprudence is that the "government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 828, 132 L. Ed. 2d 700, 115 S. Ct. 2510 (1995). Such regulations are subject to "the most exacting scrutiny," *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642, 129 L. Ed. 2d 497, 114 S. Ct. 2445 (1994), which means that the state actor must show "that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231, 95 L. Ed. 2d 209, 107 S. Ct. 1722 (1987). On the other hand, content-neutral regulations that simply restrict the time, place, and manner of speech are subject to intermediate scrutiny. *See Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton, Ohio*, 240 F.3d 553, 560 (6th Cir. 2001) (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293, 82 L. Ed. 2d 221, 104 S. Ct. 3065 (1984)). Under that analysis, content-neutral regulations must be "narrowly tailored to serve a significant governmental interest . . . that . . . leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 105 L. Ed. 2d 661, 109 S. Ct. 2746 (1989).

The Supreme Court has recognized that "deciding whether a particular regulation is content based or content neutral is not always a simple task." *Turner Broad.*, 512

U.S. at 642. In this instance, the district court concluded that the recruiting rule "is content-based because the interests asserted by [TSSAA] to support the ban focus on the content of the message and the effect of the message on the listener." We respectfully disagree.

In our opinion, the recruiting rule does not impose a total ban, or a "Berlin Wall" as Brentwood calls it, on communications between secondary schools and middle school athletes regarding high school athletics. Rather, the recruiting rule prohibits secondary schools from exerting an "undue influence" on students with the goal of "securing or retaining a student for athletic purposes." We do not see how the recruiting rule, as defined by the questions, answers, and guidelines contained within the TSSAA Bylaws, bans the substantive content of any particular message. It is clear to us that the greatest restriction imposed by the recruiting rule is the prohibition on coaches, coaching staff, and school representatives from initiating contact with middle school students for the purpose of recruiting student athletes.

In our view, prohibiting coaches from initiating contact with students or their parents prior to enrollment in the school is a limitation on the manner in which secondary schools can communicate with students about their athletic programs. It does not mean, however, that Brentwood has no other outlet for providing such information to prospective students, or that middle school students have no way of finding out this information or learning about their educational options.

Perhaps the strongest evidence in the record that supports our view that the recruiting rule does not constitute a total ban on communications between secondary schools and prospective students regarding athletic programs is the letter that Brentwood attorney Michael Peek wrote to Ronnie Carter following their meeting in February of 1993. The letter details numerous ways in

which Brentwood can get its message about athletics out to prospective students. Examples of conduct that Peek claims were explicitly approved by Carter on behalf of TSSAA include the following: admissions officers and representatives of Brentwood can supply information that real estate agents may give to new families moving to the community; Brentwood can respond to direct inquiries from students or their families that have contacted it for information; Brentwood can advertise in any publication it chooses; and Brentwood can contact 7th and 8th graders in any school regardless of their extracurricular activities and interests if such contact is made in the context of a letter or other communication directed to members of the class as a whole. We believe that this range of options, which is not exclusive, acknowledges that Brentwood has multiple ways of communicating with middle school students to provide them with information about the academic, athletic, and spiritual aspects of the educational experience at Brentwood.

We fail to see how the recruiting rule "effectively drives certain ideas or viewpoints from the marketplace." *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116, 116 L. Ed. 2d 476, 112 S. Ct. 501 (1991). But Brentwood maintains that the recruiting rule constitutes a content-based regulation of speech in at least three ways. First, it argues that the recruiting rule prohibits independent schools and their representatives from "discussing an entire topic." *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 537, 65 L. Ed. 2d 319, 100 S. Ct. 2326 (1980). Second, Brentwood claims that the rule prevents prospective students and their parents from learning about independent educational options. Finally, it maintains that TSSAA enacted the recruiting rule to prevent prospective students from learning about athletic programs at independent secondary schools.

Brentwood's three contentions, however, are not persuasive. As described above, the prohibitions of the recruiting rule do not prevent representatives of Brentwood from discussing the entire topic of its athletic programs. Prospective students and their parents also have a wide range of available means to receive information about the athletic and educational opportunities that Brentwood provides. Nor is there evidentiary support for Brentwood's position that the recruiting rule is a content-based regulation designed by TSSAA out of fear of what prospective students would learn about the athletic programs at independent secondary schools. If TSSAA had been motivated by a fear of the impact that information regarding athletic programs would have on students, it would presumably have banned recruiting and communications altogether. This it did not do.

Finally, we reject Brentwood's contention that the recruiting rule is unconstitutional because it controls who can speak for Brentwood. The recruiting rule is not an unconstitutional regulation that "dictates . . . the speakers who may address a public issue." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784-85, 55 L. Ed. 2d 707, 98 S. Ct. 1407 (1978) (holding that a state statute prohibiting expenditures by banks and business corporations for the purpose of influencing the vote on any question other than one materially affecting the business interests of the corporation unconstitutionally infringed on their First Amendment rights). Although the rule emphasizes that coaches and members of the coach's staff must refrain from exerting "undue influence" by initiating contact with prospective students, the rule does not ban these persons from communicating with students who themselves initiate contact.

In sum, we conclude that the district court erred in holding that the recruiting rule is a content-based regulation subject to analysis under "the most exacting scrutiny."

Turner Broad. Sys. Inc. v. FCC, 512 U.S. 622, 642, 129 L. Ed. 2d 497, 114 S. Ct. 2445 (1994). We therefore turn to an analysis of the rule as a content-neutral regulation.

D. The recruiting rule is a content-neutral regulation subject to intermediate scrutiny

We are of the opinion that the recruiting rule is a content-neutral regulation analogous to certain zoning ordinances that have been deemed to contain reasonable time, place, and manner restrictions. In *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986), for example, an ordinance provided specific zoning requirements for adult theaters. The Supreme Court found that "the Renton ordinance [was] aimed not at the *content* of the films shown at 'adult motion picture theatres,' but rather at the *secondary effects* of such theaters on the surrounding community." *Id.* at 47 (emphasis in original). As long as the zoning ordinance did not ban the existence of these theaters outright, the Supreme Court found it to be content neutral. *See id.* at 46 ("The Renton ordinance . . . does not ban adult theaters altogether, but merely provides that such theaters may not be located within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school."). Similarly, the recruiting rule does not completely ban all communications between coaches and prospective students, but does keep them "at a distance" by prohibiting the coaches and those acting on their behalf from initiating the contact.

Other examples of regulations that have been upheld against First Amendment challenges despite limiting the time, place, and manner of the targeted activities include *Madsen v. Women's Health Ctr, Inc.*, 512 U.S. 753, 772, 129 L. Ed. 2d 593, 114 S. Ct. 2516 (1994) (upholding a state court injunction that restricted the use of sound amplification equipment and other noise created by antiabortion protesters to certain hours and days); *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 814-15, 80

L. Ed. 2d 772, 104 S. Ct. 2118 (1984) (upholding an ordinance that prohibited the posting of signs on public property based on the government's interest in promoting aesthetics); *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 69 L. Ed. 2d 298, 101 S. Ct. 2559 (1981) (upholding a state regulation requiring a religious organization that desired to distribute religious materials and solicit donations at a state fair to do so only at a rental booth in the designated area).

The Supreme Court has recognized that content-neutral regulations can have a dampening effect on the substance of the protected speech, but that such limitations are constitutionally permissible. "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 105 L. Ed. 2d 661, 109 S. Ct. 2746 (1989) (upholding the regulation of noise levels at musical performances in a public park to avoid undue intrusion on the tranquility of the surrounding public and residential areas). Assuming that TSSAA is able to successfully establish that it has substantial governmental interests in support of the recruiting rule (see Part II.F. below), we cannot say that the rule's incidental effect of preventing members of high school coaching staffs from initiating contact with middle school students is fatal to content neutrality. *See United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 816, 146 L. Ed. 2d 865, 120 S. Ct. 1878 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.").

Based on our conclusion that the recruiting rule is content neutral, it is subject to an intermediate scrutiny standard of review. *See Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton, Ohio*, 240 F.3d 553, 560 (6th Cir. 2001). "'Content-neutral' time, place, and manner

regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." *City of Renton*, 475 U.S. at 47; *see also Ward*, 491 U.S. at 798 ("the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but . . . it need not be the least restrictive or least intrusive means of doing so").

E. The recruiting rule is not facially overbroad in violation of the First Amendment

The district court also held that even if the recruiting rule is not an unconstitutional content-based regulation, it runs afoul of the First Amendment because the language of the rule provides TSSAA with the "unbridled discretion to penalize those expressing points of view with which it disagrees." In so ruling, the district court relied on *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 129-33, 120 L. Ed. 2d 101, 112 S. Ct. 2395 (1992). *Forsyth County* involved a facial challenge under the "overbreadth doctrine" to a county ordinance that required parties to obtain a permit and pay a fee in order to gain authorization to speak publicly, hold a public parade, or assemble. A challenge under this doctrine can be mounted in "cases where every application creates an impermissible risk of suppression of ideas, such as an ordinance that delegates overly broad discretion to the decisionmaker." *Id.* at 129. The district court concluded that terms such as "undue influence" and "appropriate or normal" in the recruiting rule are so undefined and provide TSSAA with such arbitrary discretion that the rule is an impermissibly overbroad regulation.

TSSAA first attempts to avoid a challenge under the overbreadth doctrine by arguing that the recruiting rule regulates commercial speech. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497, 71 L. Ed. 2d 362, 102 S. Ct. 1186 (1982) ("the

overbreadth doctrine does not apply to commercial speech"). It claims that because Brentwood is a private school, recruiting students is a commercial activity. We agree with the district court that the recruiting rule does not invoke the commercial speech analysis. The "test for identifying commercial speech" involves determining whether a regulation relates to a "commercial transaction." *Bd. of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 473-74, 106 L. Ed. 2d 388, 109 S. Ct. 3028 (1989) (determining that America Future Systems, Inc.'s "tupperware party"-like lectures on its housewares in college dormitories constituted commercial speech, and remanding the case for review under the intermediate scrutiny standard); *see also City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 422-23, 123 L. Ed. 2d 99, 113 S. Ct. 1505 (1993) (striking down a city's selective and categorical ban on the distribution, via newsrack, of "commercial handbills" as violative of the First Amendment).

We conclude that TSSAA's argument in this regard is unpersuasive. Brentwood is an educational institution. The fact that it is private does not render its academic, athletic, and spiritual goals commercial. Nor is TSSAA able to cite any authority in support of its "commercial transaction" argument as applied to the recruiting of student athletes by a private school. Because we conclude that the recruiting rule does not constitute a regulation of commercial speech, we must now turn to TSSAA's alternate contention that the rule is not unconstitutional under the overbreadth doctrine.

"A facial challenge to a legislative Act, is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745, 95 L. Ed. 2d 697, 107 S. Ct. 2095 (1987). The Supreme Court has set forth the following

principles for evaluating facial challenges under the overbreadth doctrine:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Grayned v. City of Rockford, 408 U.S. 104, 108-09, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972).

"To succeed . . . the complainant must demonstrate that the law is impermissibly vague in all of its applications." *Village of Hoffman Estates*, 455 U.S. at 497. Cases that have held legislation unconstitutional on its face under the overbreadth doctrine, moreover, have not created "any exception from the general rule that constitutional adjudication requires a review of the application of a statute to the conduct of the party before the Court." *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 798, 80 L. Ed. 2d 772, 104 S. Ct. 2118 (1984); *see also Bd. of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 484-85, 106 L. Ed. 2d 388, 109 S. Ct. 3028 (1989) ("It is not the usual judicial practice, however, nor do we consider it generally desirable, to proceed to an overbreadth issue unnecessarily — that is, before it is determined that the statute would be valid as applied. Such a course would convert use of the overbreadth doctrine from a necessary

means of vindicating the plaintiff's own right not to be bound by a statute that is unconstitutional into a means of mounting gratuitous wholesale attacks upon state and federal laws.").

In our opinion, the district court erred in striking down the recruiting rule as facially overbroad without focusing on how the rule was applied to Brentwood. We turn now to this analysis. TSSAA found that Brentwood's two violations of the recruiting rule consisted of admitting middle school athletes free of charge to an athletic contest at Brentwood and of contacting middle school students to inform them of Brentwood's athletic practices before they were enrolled there. In particular, the second violation arose from Coach Flatt's letter to incoming students regarding spring football practice and followup telephone calls to the students. Pursuant to Article II, Section 1(b) of TSSAA's Bylaws, a student is not considered "enrolled" until he or she has attended the school for at least three days. None of the incoming students met this criterion.

Both of Brentwood's alleged violations are explicitly listed as prohibited conduct that constitutes "undue influence" in the commentary accompanying the recruiting rule. As previously noted, the seventh example in response to question four under the recruiting rule includes "admitting students to athletic contests free of charge where there is an admission being charged at the contest . . . ." Furthermore, the third question following the recruiting rule prohibits a coach from contacting students not enrolled in their school:

> Q. Is it permissible for a coach to contact a student or his or her parents prior to his enrollment in the school?
>
> A. No, a coach may not contact a student or his or her parents prior to his enrollment in the school.

> This shall apply to all students whether or not they have an athletic record.

These questions, answers, and guidelines are entitled to consideration in evaluating an overbreadth challenge. *See Forsyth County*, 505 U.S. at 131 ("In evaluating [the] facial challenge, we must consider the [association's] authoritative instructions of the [rule], including its own implementation and interpretation of it."); *see also Ward*, 491 U.S. at 794-96 (holding that the city's sound-amplification guideline and the city's interpretation of the guideline provided sufficient limiting instructions to render the ordinance's statements ensuring the "best sound" and "appropriate sound quality" immune from an overbreadth challenge). We also note that the Supreme Court has

> repeatedly expressed its reluctance to strike down a statute on its face where there were a substantial number of situations to which it might be validly applied. Thus, even if there are marginal applications in which a statute would infringe on First Amendment values, facial invalidation is inappropriate if the remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct.

Parker v. Levy, 417 U.S. 733, 760, 41 L. Ed. 2d 439, 94 S. Ct. 2547 (1974) (internal quotation marks omitted and ellipses in original).

The above principles are fully applicable to the case before us. Although the recruiting rule by itself is certainly subject to challenge based on vagueness and overbreadth, it is accompanied by the equivalent of two full pages of question-and-answer explanations and guideline interpretation. As a whole, the rule gives reasonable notice of what is prohibited, especially as applied to Brentwood. The interpretive commentary explicitly states that free tickets cannot be provided to prospective students, nor can

a coach initiate contact with potential players before they enroll in the school. Brentwood allegedly did both of these things, and was punished accordingly. To claim now that the rule is overbroad as applied to Brentwood strains credulity. We therefore conclude that the district court erred in holding the recruiting rule unconstitutional on the basis of being facially overbroad.

F. Remand is required to determine if the recruiting rule is narrowly tailored to meet TSSAA's substantial interests

As set forth in Part II.D. above, we have determined that the recruiting rule is a content-neutral regulation subject to intermediate scrutiny for the purpose of First Amendment analysis. This means that TSSAA has the burden of establishing (1) the legitimacy of its alleged substantial governmental interests and (2) that the recruiting rule as applied to Brentwood in the case before us is narrowly tailored to further these governmental interests. The Supreme Court has described this analysis as follows:

> [A] regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but . . . it need not be the least restrictive or least intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation . . . . The validity of time, place, or manner regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests or the degree to which those interests should be promoted.

Ward, 491 U.S. at 798-800 (internal quotation marks, alterations, and ellipses omitted).

In TSSAA's response to Brentwood's motion for summary judgment, TSSAA asserted two interests in justification of the recruiting rule: (1) to keep high school athletics in their proper place subordinate to academics and (2) to protect student athletes from exploitation. TSSAA proffered an additional interest on appeal, namely that of fostering a level playing field between the various member schools. This latter interest seeks to establish a degree of competitive equity in high school athletics by regulating how the member schools recruit student athletes.

This court previously recognized the validity of TSSAA's first asserted interest when it concluded that "[TSSAA] is ordinarily entitled to enforce its athletic rules in order to deter students, parents and school officials from trying to turn high school athletics into an activity that overshadows or unduly interferes with academic life." *Crocker v. Tenn. Secondary Sch. Athletic Ass'n*, 980 F.2d 382, 386-87 (6th Cir. 1992). The district court below also acknowledged this interest as a substantial one. TSSAA's other two justifications, however, are very much in dispute.

Brentwood, for example, argues that there is no support in the record for the proposition that student athletes need protection from exploitation. The district court agreed. It concluded that TSSAA offered no proof that exerting undue influence on middle school athletes to recruit them for athletic purposes actually *harms* those students. Proof of actual harm, however, is not required in order to recognize a state actor's interest in preventing reasonably anticipated harm. *See Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton, Ohio*, 240 F.3d 553, 565-66 (6th Cir. 2001) (holding that the village could regulate door-to-door solicitation based on a fear of an "anticipated harm" without proof of actual harm). Finally, TSSAA's newly asserted interest in a level playing field has obviously not been evaluated by either Brentwood or the district court.

The legitimacy of TSSAA's "exploitation" and "level playing field" interests cannot be decided in the abstract as a matter of law. We therefore remand this case to the district court for an evaluation of these asserted interests after TSSAA has had the opportunity to present whatever support it deems appropriate to justify its position.

After the district court decides if either or both of the above interests are legitimate, it should then apply those interests, along with TSSAA's recognized interest in keeping high school athletics in their proper place, to the alleged recruiting rule violations that TSSAA enforced against Brentwood. Its task will be to decide if the punishment exacted for these alleged violations relating to the free game tickets, spring football-practice letters, and the followup telephone calls was appropriate regulatory action narrowly tailored to further TSSAA's legitimate interests as a state actor. This question is also one that cannot be decided in the abstract as a matter of law. TSSAA should therefore be given the opportunity to present whatever support it deems appropriate to justify the need for such regulations. In proceeding with this case on remand, we caution both the parties and the district court to stay focused on the two alleged recruiting rule violations in question, rather than engage in a wide-ranging attack or defense of the recruiting rule as a whole.

G. The status of Ronnie Carter

As a final point, we note that the district court did not draw any distinction between TSSAA and Ronnie Carter, the Executive Director of TSSAA, in its grant of partial summary judgment to Brentwood. TSSAA now urges us to reverse the district court's judgment to the extent that it operates against Carter in his individual capacity. We decline to do so. Such action by us at this time would be premature, because the district court's opinion is silent on the issue of Carter's liability. We therefore direct the district court on remand to address the issue of Brentwood's

claim against Carter in both his official and individual capacities.

III. CONCLUSION

For all of the reasons set forth above, we REVERSE the grant of summary judgment in favor of Brentwood and REMAND the case to the district court for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE,
NASHVILLE DIVISION

BRENTWOOD ACADEMY

v.

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION, AND RONNIE CARTER, EXECUTIVE DIRECTOR AND INDIVIDUALLY

No. 3:97-1249.

Decided: January 13, 2003.
Entered: January 13, 2003.

Before TODD J. CAMPBELL, United States District Judge.

OPINION
MEMORANDUM

I. INTRODUCTION

Brentwood Academy has sued the Tennessee Secondary School Athletic Association ("TSSAA") and Ronnie Carter, TSSAA's Executive Director, alleging that the TSSAA Recruiting Rule, as written and applied, violates the *First* and *Fourteenth Amendments* and Tennessee law. The general background of this case is set forth in four reported opinions. *Brentwood Academy v. Tennessee Secondary Schools Athletic Ass'n.*, 13 F. Supp. 2d 670 (M.D. Tenn. 1998); *Brentwood Academy v. Tennessee Secondary Schools Athletic Ass'n.*, 180 F.3d 758 (6th Cir. 1999); *Brentwood*

Academy v. Tennessee Secondary Schools Athletic Ass'n., 531 U.S. 288, 148 L. Ed. 2d 807, 121 S. Ct. 924 (2001); and *Brentwood Academy v. Tennessee Secondary Schools Athletic Ass'n.*, 262 F.3d 543 (6th Cir. 2001). The Supreme Court held that the TSSAA is a "state actor" subject to the Constitution and 42 U.S.C. § 1983. The Court of Appeals for the Sixth Circuit then ruled that the Recruiting Rule "on its face" does not violate the *First Amendment.* The case was remanded for trial to determine if the Recruiting Rule "as applied" to Brentwood Academy violates the *First Amendment.* Also to be tried were the following additional claims that were not determined by the Court of Appeals: Substantive Due Process, Procedural Due Process, Equal Protection, and Tennessee law.[1]

The Court held a ten day bench trial commencing December 11, 2002. For the reasons described herein, the Court finds that the Recruiting Rule, as applied to Brentwood Academy, is unconstitutional in violation of the *First Amendment* and the *Fourteenth Amendment of the Constitution.* The Court further finds that Brentwood Academy's right to due process under the *Fourteenth Amendment* was violated. Therefore, the August 23, 1997 penalties imposed by the TSSAA against Brentwood Academy are void and enjoined.

This does not mean that the TSSAA cannot or should not have a Recruiting Rule. The TSSAA has demonstrated that it has substantial governmental interests in having a Recruiting Rule. Brentwood Academy agrees that there should be a strong Recruiting Rule. In this case, however, the Recruiting Rule as applied to Brentwood Academy was not narrowly tailored to achieve the TSSAA's legitimate

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[1] Brentwood Academy also asserted various antitrust claims against the TSSAA. This Court, on remand, dismissed the antitrust claims against the TSSAA based on immunity because the TSSAA, for all practical purposes, is a subdivision of the state regarding its regulatory activity over interscholastic athletics. (Order, Docket No. 254).

governmental interests. The Recruiting Rule also was applied without due process.

This Memorandum shall constitute the findings of fact, and conclusions of law, required by Fed. R. Civ. P. 52.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. *First Amendment* — As Applied.

The Court of Appeals for the Sixth Circuit remanded this case to determine if the Recruiting Rule is narrowly tailored to meet the TSSAA's alleged substantial governmental interests as applied to Brentwood Academy. *Brentwood Academy v. Tennessee Secondary Schools Athletic Ass'n.*, 262 F.3d 543 (6th Cir. 2001). The TSSAA has the burden of establishing (1) the legitimacy of its alleged substantial governmental interests and (2) that the Recruiting Rule as applied to Brentwood Academy is narrowly tailored to further these governmental interests. *Id.*

The Sixth Circuit held that the Recruiting Rule is a content-neutral regulation subject to intermediate scrutiny for purposes of the *First Amendment.* The Sixth Circuit also ruled that the Recruiting Rule is not facially overbroad in violation of the *First Amendment.* The Recruiting Rule, being content-neutral and subject to intermediate scrutiny, must be narrowly tailored to serve substantial governmental interests. The Recruiting Rule does not need to be the least restrictive alternative, but it cannot unreasonably limit alternative avenues of communication under the *First Amendment. Id.*[2]

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[2] Defendants suggest that the speech at issue is this case is not a matter of "public concern." The Court finds, and the Sixth Circuit has already determined, that under the content-neutral, intermediate scrutiny standard, the substantial governmental interests of the TSSAA by definition implicate speech that is a matter of "public concern" for purposes of the *First Amendment. Id.* The Sixth Circuit also held in this case that "commercial speech analysis" does not apply. *Id.* at 555.

The TSSAA has asserted three governmental interests to justify the Recruiting Rule: (1) to keep high school athletics in their proper place subordinate to academics; (2) to protect student athletes from exploitation; and (3) to foster a level playing field between schools for competitive equity. The first interest — keeping athletics in their proper place subordinate to academics — has already been established. *Id.*

The Recruiting Rule in dispute is a one paragraph provision contained in Section 21 of the TSSAA's Bylaws:

> Recruiting Rule
>
> Section 21. The use of undue influence on a student (with or without an athletic record), the parents or guardians of a student by any person connected, or not connected, with the school to secure or to retain a student for athletic purposes shall be a violation of the recruiting rule.

(Plaintiff's Exhibit 63; Defendant's Exhibit 68).

Following the Recruiting Rule is interpretive commentary divided into Questions and Answers and "Guidelines":

> 1.
>
> Q. How is undue influence interpreted in the recruiting rule?
>
> A. A person or persons exceeding what is appropriate or normal and offering an incentive or inducement to a student with or without an athletic record.
>
> 2.
>
> Q. What is the penalty for violation of the recruiting rule?
>
> A. Violation of the recruiting rule shall cause the student to be ineligible at the school in violation, and a penalty shall be placed against the school.

3.

Q. Is it permissible for a coach to contact a student or his or her parents prior to his enrollment in the school?

A. No, a coach may not contact a student or his or her parents prior to his enrollment in the school. This shall apply to all students whether or not they have an athletic record.

4.

Q. What are some of the guides used in determining whether there has been undue influence used which would result in a violation of the recruiting rule?

A. Some examples are, but not limited to:

a. Providing of transportation or other inducement to any prospective student/athlete to take a qualifying examination at a school, meet with school officials, etc.

b. Discussion of financial aid based on need with any prospective student/athlete by any member of the coaching staff until the student has enrolled in school (attended 3 days of school). All financial aid questions should be referred to the principal or the person in charge of financial aid. If the person in charge of

financial aid is a coach, prior approval must be granted by the Executive Director of TSSAA.

c. Any initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/ athlete enrolled in any member school except where there is a definite feeder pattern.

d. Any initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/ athlete in the seventh grade and above at any nonmember school except where there is a definite feeder pattern involving the schools.

Public high schools may contact public feeder schools (elementary, middle school, junior high school) where there is a definite feeder pattern. Private or parochial schools may contact private schools (elementary, middle school, junior high school) where

there is a definite feeder pattern.

Private or parochial schools may not contact students enrolled at the public schools. Public schools may not contact students enrolled at the private schools.

e. Any contact between a member of the coaching staff or representative of the school and prospective student/ athletes prior to, during, or after contests at elementary schools, middle schools, and junior high schools except where there is a definite pattern.

f. A member school is prohibited from giving any item with school advertisement (shirts, pennants, caps, jackets, etc.).

g. Admitting students to athletic contests free of charge where there is an admission being charged at the contest except where there is a definite feeder pattern involved with the school.

5.

Q. What is allowed by member schools in contacting prospective students?

A. A representative of the school may meet with students at a school that is defined as a feeder school or meet with students who are zoned to attend that school the following year. This visit must be cleared by the principals of both schools.

Guidelines for Understanding The "Recruiting Rule" and Understanding "What Is Undue Influence?"

1. The major theme of the "recruiting rule" is not "initial contact." The major theme is "exceeding what is normal and appropriate." Initial contact can be a violation, but is only one of many things that can exceed what is normal and appropriate.

2. One key is not treating "athletes" or "prospective athletes" any differently than students who are not athletes.

3. Students should be seen as students and not singled out based on their potential athletic ability.

4. Pre-arranged contact is seen in the same manner as initial contact.

5. Any student or family or individual that contacts a coach about attending a school where he or she coaches should be informed that they need to contact the principal, admissions department, or guidance department if they have an interest.

6. Any meeting with coaches regarding athletes or prospective athletes or their families should be at the request of the family to the individual(s) responsible for admissions and should take place at the school.

7. High school athletics is not the same as colleges recruiting high school athletes for college athletics. High school athletics exist for an entirely different

> reason. High school coaches should not view 12-, 13-, 14-year old students in the same manner as college coaches view high school seniors.
>
> 8. Administrators and coaches must realize that they have more responsibilities than the general public to understanding the purpose of high school athletics, the principles behind the TSSAA rules, etc., and to maintain a level of understanding and purpose when dealing with the general public and students.

Id. The TSSAA testified, through Ronnie Carter and members of the Board of Control, that the interpretive commentary is not a binding interpretation of the Recruiting Rule and that the Executive Director and the Board of Control have the discretion to disregard the interpretive commentary.

The TSSAA contends that the term "enrolled" used in the Recruiting Rule is defined in its Bylaws at Article II (Eligibility Rules), Section 1 (Academic Rules) as follows:

> Academic Rules
>
> Section 1. To be eligible to participate in athletic contests during any semester:
>
> ...
>
> (b) Students shall be regularly enrolled, in regular attendance, and carrying at least five full courses. A student shall be considered as regularly enrolled after the student has attended for three days, has engaged in three or more days of football, girls volleyball, cross country, golf or girls soccer practice during the period on or after August 1, or has participated in an athletic contest in any sport.

(Defendant's Exhibit 68). Plaintiff denies that this definition of "enrolled" applies to the Recruiting Rule.

The TSSAA found, among other things, that a Spring Practice Letter (Plaintiff's Exhibit 8) sent by Brentwood

Academy to all incoming ninth grade male students, whose parents had signed enrollment contracts, violated the Recruiting Rule. It is undisputed that each of the twelve students who received the Spring Practice Letter previously had applied, been tested and admitted, and signed an enrollment contract with Brentwood Academy. In addition, all the students not applying for financial aid had paid a $ 300 deposit to the school. It is also undisputed that the letter went to all incoming male students, not just student athletes.

The Spring Practice Letter states:

BRENTWOOD ACADEMY

219 Granny White Pike Brentwood, Tennessee 37027

(615) 377-3632 fax: (615) 377-3709

Athletic Director: Carlton Flatt Asst. Athletic Director: Buddy Alexander

April 23, 1997

Having officially enrolled at Brentwood Academy, the TSSAA allows you to participate in spring football practice. If you are not currently involved in a sport at your school, we would like to invite you to practice with your new team. Equipment will be given out April 30th at 3:30 downstairs in the locker room.

Spring practice will begin May 1, 1997 and conclude on May 14, 1997. Practice begins at 3:20 and will be finished by 4:45. Due to the inconvenience to your parents, please do not feel that you must attend every practice. However, I do feel that getting involved as soon as possible would definitely be to your advantage.

In the near future, you will receive a letter outlining our summer workout program. If you have any questions, please call me at school 373-0611 x 119, or at home 373-

0475. We are certainly glad that you decided to become an Eagle.

Your Coach,

Carlton Flatt

Id. The TSSAA also found that certain follow-up telephone calls by Carlton Flatt about the Spring Practice Letter violated the Recruiting Rule.

On July 29, 1997, Defendant Ronnie Carter, the Executive Director of the TSSAA, determined that Brentwood Academy violated the Recruiting Rule and imposed penalties that were effective immediately. (Plaintiff's Exhibit 86). Brentwood Academy filed an appeal which was heard by Carter along with three members of the Board of Control: Mike Hammond, Morris Rogers, and Mickey Dunn. Brentwood Academy made a presentation at this appeal hearing, but the TSSAA presented no evidence. On August 14, 1997, Carter, with the advice and consensus of the three members of the Board of Control, again found Brentwood Academy in violation of the Recruiting Rule and imposed revised penalties. (Plaintiff's Exhibit 87). Carter testified at trial that the three Board of Control members were merely advisors, but two of the members of the Board of Control (Morris Rogers and Mickey Dunn) testified that they believed they were decision-makers, rather than advisors to Carter at this hearing.

Brentwood Academy then filed a final appeal to the entire Board of Control. The Board of Control consisted of nine members, including the three members who participated in the prior decision that was the subject of the appeal. Again, Brentwood Academy made a presentation to the Board of Control at a public hearing, and the TSSAA presented no evidence. Following the presentation by Brentwood Academy, the Board of Control deliberated in private "executive session." The credible evidence at trial

establishes that during the private deliberations, Carter and the two TSSAA employees who had investigated the case — Gene Menees and Bernard Childress — answered questions from the Board of Control. Brentwood Academy was excluded from the deliberations.

On August 23, 1997, the Board of Control found that Brentwood Academy had violated the Recruiting Rule and imposed new penalties. The Board of Control's ruling provides as follows:

> This letter is in response to your appeal before the Board of Control at the Sheraton Music City on Aug. 23, 1997.
>
> First, on behalf of the entire Board I commend you and those who appeared on behalf of your school as they delivered information to us. Our Board took time to thoroughly review all the information that was presented today and that had been previously submitted to the state office.
>
> After reviewing and having a detailed discussion on all of the information, the Board's determination is that the following violations of TSSAA regulations occurred:
>
> 1. Student-athletes have been admitted free of charge to athletic contests.
>
> 2. Contact with student-athletes, initiated by Brentwood Academy, while those students were enrolled at other schools.
>
> 3. Brentwood Academy coaches conducting impermissible off-season practice with Brentwood Academy student-athletes.
>
> The details of each of the foregoing violations have been described in previous correspondence from TSSAA Executive Director Ronnie Carter. In order to communicate the decision of the Board of Control to you as soon as possible, I will not take

the time to reiterate the factual details of the foregoing violations.

The Board of Control has determined that the appropriate penalty for the foregoing violations are as follows:

1. The entire athletic program of Brentwood Academy will be on probation for four years. If there are further violations during the probationary period, TSSAA will have no choice but to take further disciplinary action.

2. Brentwood Academy's football and boys' basketball programs are suspended from the TSSAA playoff series for the 1997-98 and 1998-99 school years.

3. Brentwood Academy is fined $ 3,000 for the above violations.

4. The Brentwood Academy football and boys' basketball programs will not be permitted to engage in off-season practice in the 1997-98 and 1998-99 school years.

5. Appropriate administrative officials of Brentwood Academy will meet with the TSSAA Executive Director to develop an administrative control plan to help guard against future problems like those which precipitated this action.

The portion of the previous penalty pertaining to tournament series revenue has been removed. In addition, the Board of Control has decided that no student-athletes should be declared ineligible based on the foregoing violations provided they meet all other eligibility requirements.

Notwithstanding the modifications of the previous penalties by the Board of Control, the foregoing violations are serious. While there is no indication of a deliberate intent to violate TSSAA rules by

> Brentwood Academy officials, the Board of Control concurs with the Executive Director's concern about a lack of appropriate administrative control in various aspects of the school's athletic program. These concerns will have to be addressed in the administrative control plan to be developed.

(Plaintiff's Exhibit 88).[3]

Testifying before this Court, Carlton Flatt, Athletic Director and Football Coach of Brentwood Academy, stated that the Spring Practice Letter went to all incoming ninth grade male students who had applied, been tested and admitted, and signed enrollment contracts with Brentwood Academy. This is undisputed. One student (Jacques Curry) who had been accepted by Brentwood Academy, but had not signed an enrollment contract, was not sent the Spring Practice Letter. Approximately 95% of the students who sign enrollment contracts in the spring attend in the fall, according to Flatt. The Spring Practice Letter was sent to all incoming ninth grade male students to avoid singling out any students, particularly Ray Marley, who had been cleared by Ronnie Carter to lift weights at Brentwood Academy even though he was a student at Grassland Middle School. It is also undisputed, and admitted by Ronnie Carter, that participation at spring football practice by the incoming Brentwood Academy students was permissible under the TSSAA rules.

Flatt further testified that after the Spring Practice Letter was mailed, he got a "couple of calls" from parents regarding attendance. In order to make sure all parents knew that spring practice was optional, Flatt made follow-up telephone calls to that effect. Flatt received no complaints from parents about the Spring Practice Letter or calls. Flatt did not consider the Spring Practice Letter to be

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[3] The TSSAA's finding of a violation of the offseason practice rule is not contested by the parties.

"recruiting" because the recipients of the letter had already completed the enrollment process and thereby indicated that they were coming to school at Brentwood Academy.

Elizabeth Tate, current Admissions Director for Brentwood Academy, testified about the enrollment process used at the school. Tate also testified that independent schools by their nature must recruit students and must take every opportunity to "tell their story" to prospective and incoming parents and students.

Ellen Goldring, a Peabody Professor and "school choice" expert, testified for Plaintiff. Goldring stressed the importance of schools providing information to parents in order for parents to make informed school choices. She further testified that the TSSAA's Recruiting Rule is educationally outdated because of the growth of school choice options. Beyond zoned public schools and independent schools, current school choice offerings include magnet schools; charter schools; liberal transfer policies among public schools based on curricula; open enrollment; and transfer from low performing public schools pursuant to the new "No Child Left Behind" federal law. Independent school choices include religious schools, single gender schools, and boarding schools. Various types of specialized magnet schools (e.g., math, science, arts, and literature) are available. Charter schools will begin to operate in Tennessee this fall. Home schooling is also an option.

Goldring testified that the flow of information from schools to parents, as decision-makers, is very important to making informed school choices about both where to attend and the options available at the school that is ultimately selected. According to Goldring, the government should not be in the business of protecting specific schools from choices by parents. Goldring sees no harm in school-initiated targeted information to parents. The Recruiting Rule is inconsistent with informed school choice, according to Goldring.

Goldring opined that preventing exploitation is a significant governmental interest. She stated, however, that the Spring Practice Letter and follow-up calls were merely the free flow of harmless information and not exploitive. Goldring saw no reason to distinguish between information that can be provided by a school to parents inside a feeder pattern from information that can be provided by a school to parents outside a feeder pattern. The Spring Practice Letter, according to Goldring, does not harm a "level playing field."

Nancy Brasher, the Admissions Director for Brentwood Academy at the time of the events in question, testified consistent with Carlton Flatt about the particulars of the mailing of the Spring Practice Letter. Brasher actually mailed the Spring Practice Letter to all new, incoming ninth grade male students who had completed the enrollment process. Carlton Flatt did not have the students' names.

Brasher also testified about the overall enrollment process at Brentwood Academy. Once an enrollment contract is signed, incoming students get all mailings that all other Brentwood Academy students receive in order to integrate the new students into the school. Brasher stressed the need for the school to communicate with its incoming students for the well-being of the students. Brasher does not believe that the Spring Practice Letter was exploitive or harmful in any respect. Last year, only 8 of 700 students who signed enrollment contracts in the spring did not attend in the fall, according to Brasher.

John Slaughter, father of a Brentwood Academy student who received the Spring Practice Letter, stated that the Spring Practice Letter was not harmful or exploitive. Slaughter testified that "we recruited Brentwood Academy," not vice versa. Joe Marley, Grassland Middle School Football Coach and father of another Brentwood Academy student, Ray Marley, who received the Spring Practice Letter, testified that the Spring Practice Letter

was not inappropriate and that his son was already planning to attend spring practice. Both Slaughter and Marley stated that upon signing the Brentwood Academy enrollment contract, their school choice was final. Marley testified how the "feeder school" exception actually works in practice at public schools.

George Pitts, former public school coach (Science Hill) and current Brentwood Academy Basketball Coach, testified about how public high school coaches typically contact public middle school students in their feeder pattern under the Recruiting Rule. Pitts, in particular, testified about initial contact by coaches. Board of Control members Mike Hammond, Mickey Dunn and Morris Rogers testified similarly about the existence of the "feeder pattern" exception and how it works with public schools.

Ellis Haguewood, Headmaster of Memphis University School, testified about the importance of private schools communicating with students who have signed enrollment contracts. Haguewood had no reservations about the Spring Practice Letter or follow-up calls. He stressed that private schools see enrollment and matriculation differently. Haguewood testified that the TSSAA's definition of enrollment (attendance for three days) is a public school definition unworkable for private schools.

Milbrey Ganick, mother of a Brentwood Academy student who received the Spring Practice Letter, testified that the Spring Practice Letter was not coercive, threatening, or harassing. She called Carlton Flatt to confirm that participation was optional. Her son, Chandler Ganick, a Brentwood Academy student, testified that the Spring Practice Letter was just a harmless form letter. It did not influence his decision to attend Brentwood Academy, because he was already planning to attend.

Harry Allan, another Brentwood Academy parent, was "thrilled" to get the Spring Practice Letter. Allan did not

consider the Spring Practice Letter inappropriate or harmful and it did not influence him to send his child to Brentwood Academy, since that decision was made upon signing the enrollment contract. Allan considered the Spring Practice Letter a standard form letter. He was "excited" to get the letter and was "desperate" to get information about the various programs at the school.

Michael Obel-Omia, Admissions Director at the Roxbury Latin School in Massachusetts, testified as an expert witness for the Plaintiff. Obel-Omia stressed the importance of private schools reaching out in targeted ways to recruit students, particularly to achieve diversity. Obel-Omia saw nothing inappropriate or harmful about the Spring Practice Letter or calls.

Jim Guthrie testified as an education expert for Plaintiff. Guthrie's testimony was consistent with Goldring's. Guthrie stressed the need for schools to provide parents with information to make informed school choices about what school to attend and the options available at the school selected. Guthrie opined that the Recruiting Rule is not consistent with the modern imperatives of education. Guthrie did not perceive the Spring Practice Letter or follow-up calls as exploitive. Guthrie opined that prevention of exploitation is a substantial governmental interest as it relates to misleading, harassing, or coercing conduct.

The testimony of Hulon Watson, Superintendent of Rutherford County Schools and former Riverdale High School Principal, exemplified the hostility between public schools and private schools regarding athletics. Watson testified that Defendant Ronnie Carter was aware of the general hostility and suspicion of public schools toward private schools regarding athletics, which eventually resulted in a split into two divisions for certain TSSAA playoffs. Watson was a motivating force for the split.

Watson also testified about how the "feeder pattern" exception works in practice at public schools. The football coach of Riverdale High School sent incoming students within its feeder pattern a summer practice "Warrior" letter (Plaintiff's Exhibit 104) substantially similar to the Spring Practice Letter. Watson testified that the "Warrior" letter was "appropriate and normal" and not "undue influence." Bernard Childress, Assistant Athletic Director of the TSSAA, however, testified that the "Warrior" letter violated the Recruiting Rule. Mike Reed, President of the Board of Control, on the other hand, testified that the "Warrior" letter was not a problem.

Otis Cosby, father of another Brentwood Academy student who received the Spring Practice Letter, testified that he was pleased to get the Spring Practice Letter and that he did not consider it harmful. Cosby further testified that the decision to send his son to Brentwood Academy was made at the time he signed the enrollment contract.

Defendant Ronnie Carter, the Executive Director of the TSSAA, testified that the Spring Practice Letter and follow-up calls were harmful undue influence because of their contents: the letter came from a famous coach; the letter assumed an incorrect definition of "enrollment"; Brentwood Academy was not the student's new team yet; the phrase "if you are not currently involved in a sport" places undue emphasis on sports to the exclusion of other things; the phrase "inconvenience to your parents" does not consider inconvenience to the student; the phrase "definitely be to your advantage" really means practice is not an option; the coach's home number is included; and the reference to becoming an "Eagle" is inappropriate since the student is not yet attending the school.[4] Carter testified that

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[4] The Court finds that the preponderance of the credible evidence at trial is that the substantive "content" of the Spring Practice Letter and calls mattered and was a significant factor in the TSSAA's decision that the letter and calls constituted "undue influence" and violated the

participation in spring practice did not violate the Recruiting Rule.

Carter testified that preventing "exploitation" is the "fundamental" purpose of the Recruiting Rule. He stated that competitive equity is also a purpose of the Recruiting Rule. Carter stated that the definition of enrollment applied in the Recruiting Rule by the TSSAA is "tied to eligibility" for participation. (Defendants' Exhibit 68, pp. 28-29). The Board of Control is the "final authority" on interpreting the Recruiting Rule, but it delegates interpretive authority to the Executive Director.

Carter further testified that the interpretive commentary to the Recruiting Rule is not a binding interpretation of the Recruiting Rule and that he, the Executive Director, and the Board of Control, both have the discretion to disregard the interpretive commentary. He stated that he does not "look at feeder patterns" to determine "undue influence" Recruiting Rule violations. "Singling out" a student-athlete is what "school people" understand is prohibited by the Recruiting Rule, Carter said.

Carter testified that Brentwood Academy violated TSSAA "institutional control" requirements, but he admitted that "institutional control" is not mentioned in the TSSAA Bylaws. Carter stated there can be a violation of the Recruiting Rule without an "intent" to violate.[5] Approximately 82,000 student-athletes and 370 schools, including about 50 private schools, participate in the TSSAA. No official of the State of Tennessee has directed or ordered the TSSAA in any way concerning the Recruiting Rule or the interpretive commentary, or

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Recruiting Rule. The TSSAA penalized Brentwood Academy for the substantive "content" of the Spring Practice Letter and calls and the message they conveyed in this case.

[5] Carter failed to explain how he could determine whether influence was "for athletic purposes" without considering intent.

identified the governmental interests to be protected by the Recruiting Rule.[6] The TSSAA has not done any studies on the harm of recruiting. Carter stated that the absence of any Recruiting Rule would result in a "war zone" and coaches' resignations. He stated that "the rich would get richer real quick" if there is no prohibition on recruiting.

Curtis Masters, who became Headmaster of Brentwood Academy in July, 2002, testified that Brentwood Academy wants a strong TSSAA Recruiting Rule. He stated, however, that the Recruiting Rule needs to be clear, applied equally, and allow Brentwood Academy to "tell its story" to prospective and incoming students.

Sharon Kay Stoll, a professor in sports ethics, testified as an expert witness for Defendants. Stoll opined that a Recruiting Rule is necessary to have a level playing field and to eliminate the "specialness" of athletics. She stated that a Recruiting Rule promotes a level playing field because it gives an equal opportunity to compete. A Recruiting Rule also enhances the totality of the school experience by not placing too much recognition on athletes. Stoll opined that the Spring Practice Letter is benign outside the sports world, but inside the sports world it is harmful because it makes athletes something special. Stoll evaluated the content of the Spring Practice Letter as harmful, consistent with Ronnie Carter's testimony. Stoll's position is that all athletic recruiting should be prohibited.

Jack Roberts, the Executive Director of the Michigan equivalent of the TSSAA, also testified as an expert witness for Defendants. Roberts opined that a Recruiting Rule is necessary to prevent exploitation and to maintain a level playing field for competitive equity. Roberts used the

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[6] Pursuant to *Tenn. Code Ann.* §§ 8-6-109 and 8-6-110, and 28 U.S.C. § 2403, the Attorney General of Tennessee was advised of this case. The Attorney General did not file a motion to intervene. (Order, Docket No. 251).

NCAA as a model for a place state high school athletic associations "don't want to go" because of the complexity of its Recruiting Rule. Roberts testified that sports has too large a role in American life and that professional sports is an unrealistic goal for high school athletes. He stated that a Recruiting Rule is necessary for a level playing field because losing games all the time diminishes the students' willingness to compete, and recruiting creates an "arms race" among schools. Roberts opined that the content of the Spring Practice Letter and follow-up telephone calls was harmful for the same reasons stated by Ronnie Carter in his testimony. Roberts opined that there should be no recruiting for athletic purposes or targeted communication for athletics.

George Sage, a professor emeritus in the sociology of sports, testified as an expert witness for Defendant. He opined, like the Defendants' other experts, that a Recruiting Rule is necessary to prevent exploitation and to foster a level playing field for competitive equity. Sage also gave a brief history of sports in America. Sage cautioned not to "open the door" to recruiting as the NCAA has. Sage evaluated the content of the Spring Practice Letter and follow-up calls as harmful on the same basis as Ronnie Carter in his testimony.

Charles Thomas McMillen, a former star basketball player and Congressman, and a life-long student of sports, testified as an expert witness for Defendant. McMillen opined that the NCAA Recruiting Rule is a guide for what type of rule should be avoided. McMillen stated that the Spring Practice Letter and calls were harmful both to parents and students. McMillen evaluated the content of the Spring Practice Letter as harmful, consistent with Ronnie Carter's testimony. McMillen opined that recruiting "warps the value systems" of students; creates an unhealthy "subculture;" produces adverse health consequences; leads to commercialization; and provides no benefits. McMillen,

who is not a lawyer, opined that schools should be required to give up free speech rights just as he believes government contractors do. McMillen's position is that all athletic recruiting should be prohibited.

Glen McCadams, Dean of Students and Football Coach for David Lipscomb, a private religious school, testified in favor of a strong recruiting rule. McCadams also testified about how the "feeder pattern" exception works to allow feeder school coaches to recruit middle school students. He stated that the TSSAA is a "club of schools."

Austin Clark, Athletic Director and Basketball Coach for Baylor private boarding school in Chattanooga, testified for Defendants. The Recruiting Rule is important because "only the haves will have" if recruiting is permitted, according to Clark. He opined that athletic recruiting has no place in high school sports. Clark also stated that the Recruiting Rule is difficult to follow.

Barbara Daush, the President of St. Agnes Academy, a private religious school in Memphis and ex officio member of the Board of Control, testified that the Recruiting Rule is necessary to prevent the exploitation of students.

Bill Brown, former Headmaster of Brentwood Academy at the time of the events in question, testified that Brentwood Academy signed contracts each year to be a TSSAA member and to comply with TSSAA Rules. Brown testified that it is critical for the school to contact its students after their parents sign enrollment contracts to get the students acclimated to the school. Brown also stated that, at times, students who sign enrollment contracts with Brentwood Academy do not ultimately attend for various reasons. Brown testified that fair competition is an important goal of the TSSAA. According to Brown, the TSSAA and its Bylaws are dominated and controlled by public school interests.

Bill Brown further testified that no athletic recruiting should be permitted "period." He stated that Brentwood Academy, prior to the appeals, knew the general charges by the TSSAA but not the sources or details of the charges. According to Brown, the appeal hearings were not "fair." Brown stated that this lawsuit was brought to clear Brentwood Academy's name and to allow Brentwood Academy to tell its mission story to prospective and incoming families without violating the Recruiting Rule.

1. Governmental Interests

This case involves the intersection of the *First Amendment*, education and athletics.

This Court previously found that the TSSAA has a substantial governmental interest in keeping high school athletics "in their proper place" subordinate to academics. This finding was affirmed by the Court of Appeals on cross-motions for summary judgment. Now, after a more fully developed record at trial, this Court reconfirms this finding of fact and conclusion of law.

The Court also finds as a matter of fact, and concludes as a matter of law, that the TSSAA has a substantial governmental interest in protecting student athletes from "exploitation." The parties disagree about what constitutes "exploitation."

The Court further finds as a matter of fact, and concludes as a matter of law, that the TSSAA has a governmental interest in fostering a "level playing field" between schools for "competitive equity," but this interest is less significant than the TSSAA's substantial interests in subordinating athletics to academics and preventing exploitation. The TSSAA does not have a substantial governmental interest in preventing or discouraging students from moving from one school to another for academic or educational purposes, in whole or in part, in order to foster competitive equity in athletic contests. The

substantial governmental interest in informed school choice trumps any governmental interest in controlling which schools or teams win athletic contests.[7] Academics are more important than athletics.

The *First Amendment* question thus becomes whether the Recruiting Rule, as applied to Brentwood Academy, is narrowly tailored to further the three identified governmental interests.

2. Not Narrowly Tailored

The TSSAA found Brentwood Academy violated the Recruiting Rule by "contact with student-athletes, initiated by Brentwood Academy, while these students were enrolled at other schools." (Plaintiff's Exhibit 88). The Recruiting Rule, which prohibits "undue influence" for athletic purposes, does not expressly prohibit such "contact." The "contact" violation is based on Question 3 (no coach "contact"), and Question 4, Examples 3 ("no initial contact"), and 4 ("private ... schools may not contact students enrolled at the public schools"), and Question 1 ("exceeding what is appropriate and normal") of the interpretive commentary. (Plaintiff's Exhibit 63). ("The details of each of the foregoing violations have been described in previous correspondence from TSSAA Executive Director Ronnie Carter," Plaintiff's Exhibit 88; see the July 29, 1997 (Plaintiff's Exhibit 86) and August 14, 1997 (Plaintiff's Exhibit 87) letters of the TSSAA regarding violations.)

For the reasons described herein, the Court finds, as a matter of fact, and concludes as a matter of law, that the Recruiting Rule (Article II, Section 21, Plaintiff's Exhibit 63) is not narrowly tailored to further any of the three governmental interests of the TSSAA as applied to

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[7] Board of Control member Morris Rogers also testified in deposition that a purpose of the Recruiting Rule was to protect schools and coaches from other schools taking their students. This is not a legitimate governmental interest in this case.

Brentwood Academy. Inclusion of the interpretive commentary does not save the Recruiting Rule.[8] The Court further finds as a matter of fact, and concludes as a matter of law, that the interpretive commentary (e.g., Questions 1 and 3 and Question 4, Examples 3 and 4) does not make the Recruiting Rule narrowly tailored to further any of the three governmental interests of the TSSAA as the Recruiting Rule was applied to Brentwood Academy in this case. The Recruiting Rule, therefore, is unconstitutional as applied to Brentwood Academy based on the facts in this case.

The Court finds that the Spring Practice Letter (Plaintiff's Exhibit 8) and the follow-up telephone calls are consistent with and do not violate the TSSAA's legitimate governmental interests. The Spring Practice Letter and calls caused no actual harm and did not reasonably threaten harm to students, parents, or any legitimate governmental interests. The Spring Practice Letter and calls simply were harmless informational speech about a permitted athletic practice from a private school to all the parents of all the male students who had applied, been tested and admitted, and signed enrollment contracts, students who had already decided to attend Brentwood Academy. The Spring Practice Letter and calls did not "single out" students since they went to all the families of all the male students who had completed the enrollment process.[9] The Spring Practice Letter and calls were "appropriate" and "normal" speech for a school and they did not constitute "undue influence." They

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[8] For instance, Ronnie Carter and members of the Board of Control testified that the interpretive commentary to the Recruiting Rule is not binding and that the Executive Director and the Board of Control have the discretion to disregard the interpretive commentary and have done so.

[9] Certain statements made by Board of Control members and some of Defendants' experts demonstrate a misunderstanding of this undisputed fact.

are an example of "due," rather than "undue," influence, as testified by the parents of these students.

The Spring Practice Letter and calls did not elevate athletics over academics. Neither students nor parents were exploited in theory or in fact. Nothing in the communications from Brentwood Academy to the parents of incoming students violated competitive equity, since the athletic practice at issue was clearly permitted by the TSSAA. Neither the content of the Spring Practice Letter or calls, nor the act of a coach contacting parents and students about spring practice, was adverse to the TSSAA's legitimate governmental interests.

The failure of the TSSAA to narrowly tailor the Recruiting Rule, as applied in this case, is made further evident by the "feeder pattern" exceptions that exist in the interpretive commentary to the Recruiting Rule. As applied in this case, there is no legitimate reason to permit speech in a feeder pattern but prohibit the same speech by Brentwood Academy to its incoming students.[10] Various witnesses testified about how the "feeder pattern" exception for public school is actually used to broadly permit the type of speech for which Brentwood Academy has been sanctioned by the TSSAA. The bottom line is that schools in a "feeder pattern" can make certain school-initiated,

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[10] The Court finds as a matter of fact, and concludes as a matter of law, that "feeder pattern" exceptions to the Recruiting Rule exist and have been applied by the TSSAA. *See, e.g.*, Recruiting Rule, Question 4, Examples 3, 4, and 5. The preponderance of the credible testimony is that the "feeder pattern" exceptions have long existed and have been applied by the TSSAA and relied upon by member schools. (See testimony of Board of Control members Mike Reed, Mike Hammond, and Mickey Dunn regarding their understanding of the "feeder pattern" exception; and testimony of George Pitts, Joe Marley, John Slaughter, and Harry Allan as to actual incidents of contact within the "feeder pattern.") The Sixth Circuit has also recognized the "feeder-school exemption" and that Brentwood Academy has no "feeder pattern with any school." 262 F.3d at 548.

targeted speech that schools, such as Brentwood Academy, outside the "feeder pattern," cannot make. The Recruiting Rule, therefore, is under-inclusive of speech as applied to Brentwood Academy.

The Court further finds, and concludes as a matter of law, that the TSSAA broadly and unconstitutionally applied the Recruiting Rule to Brentwood Academy over what is essentially post-recruiting activity. This is especially troublesome. The parents and students who received the Spring Practice Letter and calls had already completed any "recruiting" process since the students had applied, been tested and admitted, and signed enrollment contracts. The TSSAA did not have a substantial governmental interest in regulating this post-recruiting speech by Brentwood Academy to these students who had completed the enrollment process in this case. This post-recruiting application of the Recruiting Rule to Brentwood Academy was not narrowly tailored to further any legitimate governmental interests of the TSSAA.[11] The post-recruiting application of the Recruiting Rule to Brentwood Academy also was not a narrowly tailored time, place, and manner restriction on Brentwood Academy's constitutional right to speak.[12]

The Defendants contest whether the Brentwood Academy enrollment contracts were binding as a matter of

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[11] The fact that the Recruiting Rule expressly applies "to retain" as well as "to secure" students for athletic purposes does not alter the balance of constitutional interests as applied to Brentwood Academy. On the facts of this case, the TSSAA had no narrowly tailored legitimate governmental interest in preventing or discouraging speech by Brentwood Academy to "retain" these students who had completed the enrollment process.

[12] Additionally, the post-recruiting application of the Recruiting Rule was not narrowly tailored to control any "secondary effects" of Brentwood Academy's speech in this case. Also, the application of the Recruiting Rule to Brentwood Academy in this case is with reference to the content of the speech and the impact of the speech.

Tennessee contract law.[13] For purposes of the *First Amendment*, however, this contract issue is not outcome determinative. By the point at which the parents signed the enrollment contracts, the balance of constitutional interests tipped in favor of Brentwood Academy being able to communicate with the incoming students, whether or not the students somehow might wiggle out of their contracts, and weighed against the TSSAA's legitimate governmental interests. Brentwood Academy had a substantial and superior constitutionally protected *First Amendment* interest in communicating with the incoming students about all aspects of the school, including sports, so that the parents and students could make informed choices about education.

Defendants stress that Brentwood Academy "voluntarily" signed contracts wherein the school agreed to comply with TSSAA Rules. However, the Sixth Circuit has already held in this case that Brentwood Academy "has not waived its right to challenge the constitutionality of the recruiting rule by voluntarily joining TSSAA." 262 F.3d at 551.

The Defendants' suggestion that Brentwood Academy should either leave the TSSAA or change the TSSAA rules does not remedy the constitutional violation. The TSSAA is effectively the only game in town for the same reasons the TSSAA is a state actor. Also, the amendment of the Recruiting Rule or the definition of "enrolled" is not within the control of Brentwood Academy. Neither Brentwood Academy nor any private school was on the Legislative Council at the time in question. In any event, and as the Sixth Circuit has already held in this case, Brentwood Academy cannot be forced to waive its *First Amendment* rights. *Id.*

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[13] The Sixth Circuit has already recognized in this case that the students at issue had "contractually agreed to attend" *Brentwood Academy*. 262 F.3d at 548.

The Recruiting Rule, as applied to Brentwood Academy, also unreasonably prohibited avenues of communication — one form letter and one follow-up call — that were not intrinsically coercive, threatening, harassing, or otherwise harmful.[14] The face-to-face communication permitted and practiced in the "feeder patterns" has a greater potential for "undue influence" and exploitation than the Spring Practice Letter and calls.

Finally, the Court further finds as a matter of fact, and concludes as a matter of law, that the punishment exacted for the alleged violations by Brentwood Academy relating to the Spring Practice Letter and follow-up calls was not appropriate regulatory action narrowly tailored to further the governmental interests of the TSSAA as a state actor for the above reasons.

In summary, for purposes of the *First Amendment*, the Recruiting Rule "as applied" to Brentwood Academy in this case is unconstitutional.[15] The Recruiting Rule is not narrowly tailored to achieve the legitimate governmental interests of the TSSAA as applied to Brentwood Academy based on the facts in this case. Judgment shall enter for

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[14] In contrast, the TSSAA permitted face-to-face communication with a middle school student who had not signed an enrollment contract. When Coach Joe Marley wanted his middle school son to lift weights with the Brentwood Academy football team, where face-to-face communication with both coaches and students would clearly occur routinely, Ronnie Carter told Carlton Flatt to just get a letter (Plaintiff's Exhibit 7) from the father indicating his intent to send the student to Brentwood Academy and it would be permissible.

[15] Defendants argued at closing argument that this case should not be in federal court and that only the lawyers will benefit from it. The United States Supreme Court found this case belongs in federal court when it found the TSSAA to be a state actor. *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288, 148 L. Ed. 2d 807, 121 S. Ct. 924 (2001). It is one of the roles of federal courts to interpret the *First* and *Fourteenth Amendments* and prevent unconstitutional state action. The TSSAA, as a state actor, controls more than 82,000 students and 370 schools which participate in TSSAA-governed sports. The TSSAA is not, and should not be, beyond judicial review.

Brentwood Academy against the TSSAA on the *First Amendment* "as applied" claim.[16]

B. Substantive Due Process

The TSSAA also found that Brentwood Academy violated the Recruiting Rule because "student-athletes have been admitted free of charge to athletic contests." (Plaintiff's Exhibit 88). The Recruiting Rule does not expressly prohibit "free admission" to games. The violation is based on Question 4, Example 7 of the interpretive commentary:

> Admitting students to athletic contests free of charge where there is an admission being charged at the contest except where there is a definite feeder pattern involved with the school.

(Plaintiff's Exhibits 63, 86 and 87).

For the reasons stated herein, the Court finds as a matter of fact, and concludes as a matter of law, that the Recruiting Rule, including the interpretive commentary, violates substantive due process as applied to Brentwood Academy regarding the complimentary tickets at issue here.

The U.S. Supreme Court has held that the *Fourteenth Amendment* guarantees more than fair process; it also covers a substantive sphere as well, barring certain government actions regardless of the fairness of the procedures used to implement them. *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S. Ct. 1708, 1713, 140 L. Ed. 2d 1043 (1998). The touchstone of due process is protection of the individual against arbitrary action of government, whether the fault lies in a denial of fundamental procedural fairness or in the exercise of power without any reasonable

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[16] The Recruiting Rule was enacted by the TSSAA commencing in the 1930's (Plaintiff's Exhibits 74-77 and 61-62) and ultimately enforced by the Board of Control, not Defendant Ronnie Carter (Plaintiff's Exhibit 88). Accordingly, any *First Amendment* "as applied" claim against Defendant Carter, individually, is dismissed.

justification in the service of a legitimate governmental objective. *Id.* at 1716. "Since the time of our early explanations of due process, we have understood the core of the concept to be protection against arbitrary action." *Id.*[17]

In *Collins v. Harker Heights*, the Supreme Court noted that the *Due Process Clause* was intended to prevent government officials from abusing their power or employing it as an instrument of oppression. *Collins*, 503 U.S. 115, 112 S. Ct. 1061, 1069, 117 L. Ed. 2d 261 (1992). Historically, this guarantee of due process has been applied to deliberate decisions of government officials to deprive a person of life, liberty or property. *Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662, 665, 88 L. Ed. 2d 662 (1986).[18] The asserted denial of due process is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial or fundamental fairness may, in other circumstances, and in the light of other considerations, fall short of such denial. *Lewis*, 118 S. Ct. at 1719.

The Sixth Circuit Court of Appeals has stated that substantive due process is a "doctrine that governmental deprivations of life, liberty or property are subject to limitations regardless of the adequacy of the procedures employed." *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1216 (6th Cir. 1992). Liability will attach to conduct intended to injure which is in some way unjustifiable by any governmental interest. *Ewolski v. City of Brunswick*, 287 F.3d 492, 510 (2002) (citing *Lewis*).

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[17] History reflects the traditional and common sense notion that, like its forebearer in the Magna Carta, the *Due Process Clause* was intended to secure the individual from the arbitrary exercise of the powers of government. *Daniels v. William*, 474 U.S. 327, 106 S. Ct. 662, 665, 88 L. Ed. 2d 662 (1986).

[18] For example, the Court explicitly observed that citizens have a substantive due process right not to be subjected to arbitrary and irrational zoning decisions. *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 97 S. Ct. 555, 562, 50 L. Ed. 2d 450 (1977).

Along with establishing a protected property or liberty interest, a plaintiff must demonstrate that it was the victim of a governmental action that was arbitrary, irrational, or tainted by improper motive in order to show a substantive due process violation. *Woodwind Estates, Ltd. v. Gretkowski*, 205 F.3d 118, 124 (3d Cir. 2000). Evidence that the government acted improperly for reasons unrelated to the merits of its decision may support a finding that the government arbitrarily or irrationally abused its power in violation of substantive due process. *Id.* In disputed factual situations, the determination of the existence of improper motive or bad faith is properly made by the finder of fact. *Id.*

Substantive due process serves as a vehicle to limit various aspects of potentially oppressive government action, *Valot v. Southeast Local School District Bd. of Educ.*, 107 F.3d 1220, 1228 (6th Cir. 1997), and involves the right not to be subject to arbitrary or capricious action by a state either by legislative or administrative action. *Buckeye Cmty. Hope Found. v. City of Cuyahoga Falls*, 263 F.3d 627, 641 (6th Cir. 2001).[19]

A substantive due process analysis must begin with a careful description of the asserted property or liberty right. *Washington v. Glucksberg*, 521 U.S. 702, 117 S. Ct. 2258, 2268, 138 L. Ed. 2d 772, 117 S. Ct. 2302 (1997); *Reno v. Flores*, 507 U.S. 292, 113 S. Ct. 1439, 1447, 123 L. Ed. 2d 1 (1993).

The Court finds as a matter of fact, and concludes as a matter of law, that Brentwood Academy had a property interest, at a minimum, in the three thousand dollar ($ 3,000) fine assessed against it by the TSSAA (Plaintiff's Exhibit

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[19] For example, the Sixth Circuit has acknowledged a cognizable substantive due process claim where plaintiffs alleged damages caused by an irrational municipal agency action. *Oakwood Homeowners Ass'n v. City of Mackinac Island*, 2000 U.S. App. LEXIS 25258, 2000 WL 1434708 at ** 2 (Sept. 20, 2000).

88). *See, e.g., Contractors Against Unfair Taxation Institution on New Yorkers v. City of New York*, 1994 U.S. Dist. LEXIS 11799, 1994 WL 455553 (S.D.N.Y. Aug. 19, 1994) (property interest in money allegedly exacted for payment of fines for traffic violations); *Jones v. Cowley*, 948 F.2d 1294 (10th Cir. 1991) ("Certainly, there is no doubt that the $ 15 fine is a deprivation of a property interest."); *Murray v. Dosal*, 150 F.3d 814 (8th Cir. 1998) (inmate has property interest in money received from outside sources). Brentwood Academy also had a property interest in the post-season basketball tournament revenue that it would have received but for the suspension imposed by the TSSAA. *Id.* Ronnie Carter and Carlton Flatt both testified that all TSSAA basketball teams are tournament eligible and receive certain minimum revenue.

Brentwood Academy was deprived of its property interests immediately upon issuance of the July 29, 1997 letter (Plaintiff's Exhibit 88) from the TSSAA since the penalties were effective immediately.

In this case, the credible evidence at trial established that Kevin Armstrong, an assistant football coach at Neely's Bend Middle School, called Carlton Flatt for complimentary tickets to a Brentwood Academy football game. Armstrong and Flatt had never met or spoken. The Court credits the testimony of Flatt and Armstrong[20] that, at the time these tickets were discussed and used, Armstrong had never mentioned any prospective student athletes to Flatt. Armstrong told Flatt that he intended to take his adult girlfriend and her adult sister to the game. Flatt, in accordance with prior policy, arranged for tickets to be available in Armstrong's name at a "will call" ticket window. Flatt specifically told Armstrong that the tickets could be used by only adults, not by students.

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[20] Flatt and Armstrong are the only witnesses with personal knowledge of telephone calls between them.

Armstrong's intended adult guests ultimately were unable to attend the game. Armstrong testified that at the suggestion of the head football coach at Neely's Bend, Armstrong decided to take three student football players (Jesse Kellogg, Glean Eddy, and Courtney Hale) to the Brentwood Academy game as a reward for a good season. Because Eddy was an "at-risk" student, Armstrong had been designated his "mentor" by the principal of Neely's Bend and was "like a father" to him. It is undisputed that Armstrong never informed Carlton Flatt, or anyone at Brentwood Academy, that Armstrong intended to or did use the complimentary tickets for two students in contravention of Flatt's express instructions.

Armstrong took the three football players to the game. Armstrong made Eddy pay for his own ticket, with Eddy's own money, because Eddy had an interest in maybe attending Brentwood Academy. Armstrong identified himself at the "will call" ticket window and obtained the three complimentary tickets previously put there in his name.[21] Armstrong, without informing anyone at Brentwood Academy, used one ticket for himself and the other two tickets for Kellogg and Hale to be admitted to the game. Brentwood Academy charged five dollars ($ 5.00) admission to the game. Armstrong and the students sat in bleacher seats with other spectators. Neither Armstrong, nor any of the students, spoke to Carlton Flatt or any other Brentwood Academy coach.

As an initial matter, the Court finds that Brentwood Academy did not violate the express language of Question 4, Example 7 of the interpretive commentary to the Recruiting Rule.[22] Carlton Flatt gave complimentary

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[21] The tickets were not given to the "wrong" person or to middle school students at the ticket window.

[22] Carter testified that the problem with the complimentary tickets was "singling out" the students. Brentwood Academy did not single these students out; Armstrong did.

tickets to another coach, not to students, as a professional courtesy. Armstrong gave the tickets to the students, without any knowledge of Brentwood Academy, after being expressly told that the tickets could be used only by adults.

The Court finds as a matter of fact, and concludes as a matter of law, that the Recruiting Rule, as applied to Brentwood Academy regarding the complimentary tickets, violates substantive due process.

As applied, the Recruiting Rule did not give Brentwood Academy constitutionally adequate notice that providing tickets to another coach, who secretly disregards express instructions to use the tickets only for adults, will constitute a violation. The Recruiting Rule is unconstitutionally vague as applied to Brentwood Academy on the facts of this case.

It is a basic principle of due process that a rule, regulation or law is void for vagueness if its prohibitions are not clearly defined. *Grayned v. City of Rockford*, 408 U.S. 104, 92 S. Ct. 2294, 2298, 33 L. Ed. 2d 222 (1972). The Recruiting Rule prohibition concerning free admission, as applied to Brentwood Academy under the facts presented at trial, is not clearly defined. As noted by the Sixth Circuit in this case,[23] the *Grayned* opinion states that "because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Id.* at 2298-99. Here, the Recruiting Rule did not give a person of ordinary intelligence, specifically Brentwood Academy, a reasonable opportunity to know what was prohibited with regard to complimentary tickets so that it could act accordingly. Specifically, as noted above, Brentwood Academy was not

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[23] The Sixth Circuit specifically cited *Grayned* with regard to the *First Amendment* facial challenge. 262 F.3d 543, 555. Nonetheless, the principles concerning due process are also on point with regard to the Recruiting Rule "as applied" to Brentwood Academy.

adequately advised that providing complimentary tickets to a middle school football coach, with expressed instructions that they be used for adults only, could result unwittingly in a penalty against Brentwood Academy. Neither did the Recruiting Rule advise Brentwood Academy that specific monitoring procedures may be required at the ticket booths and gates.

Grayned also states that vague laws may trap the innocent by not providing fair warning. *Id.* at 2299. Under the facts of this case, the Recruiting Rule failed to provide fair warning that Brentwood Academy could be punished for the acts of a middle school football coach who, unbeknownst to Brentwood Academy, gave the complimentary tickets to students, even though he had been specifically told to use the tickets for adults only. In addition, the Recruiting Rule failed to provide fair warning to Brentwood Academy that, as applied to them, the Recruiting Rule required specific monitoring procedures at the ticket windows and gates in order to avoid being punished for a violation by a non-Brentwood Academy person.[24]

Finally, *Grayned* holds that in order to avoid arbitrary and discriminatory enforcement, laws must provide explicit standards for those who apply them — in this case, Ronnie Carter and the TSSAA Board of Control. "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Id.* Here, there are no explicit standards; rather, Brentwood Academy was held strictly liable for all tickets to its game, regardless of who actually

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[24] The evidence at trial was that the TSSAA does not have any specific procedural requirements or protocols for complimentary tickets or admissions. In any event, neither the Recruiting Rule, nor the Bylaws, gave Brentwood Academy fair warning or notice of any required "institutional control" for complimentary tickets or admissions.

provided them to students. Brentwood Academy could not predict how the rule would be interpreted and applied to it.

Furthermore, the Court finds, as a matter of fact, and concludes as a matter of law, that the TSSAA Bylaws provide no explicit standards as to the penalties to be imposed for Recruiting Rule violations. Ronnie Carter, TSSAA Executive Director, testified that the penalty section was taken out of the Recruiting Rule and penalties rest in the sound discretion of the Executive Director. The Bylaws provide specific penalties for some violations — e.g., Article II, Sections 10 and 32; Article III, Sections 5, 6 and 8 — but no specific penalties or standards for punishing violations of the Recruiting Rule.

Question 2 following the Recruiting Rule states, in response to an inquiry about penalties for violations, that violation of the Recruiting Rule "shall cause the student to be ineligible at the school in violation, and a penalty shall be placed against the school." It does not say how long the student is ineligible or what range of or specific penalties may be imposed upon a school. As applied to Brentwood Academy, the students were not held to be ineligible and the penalty, undefined and unlimited in the rule, included a $3,000 fine, "probation" for four years, and suspension of the football and men's basketball teams from the TSSAA playoff series for two years. (Plaintiff's Exhibit 88).

Although specific fines are imposed for certain other violations, *see, e.g.*, Article III, Sections 5, 6, and 8, which specify a $ 25.00 fine for violation of those sections, no ranges or guidelines are provided in the TSSAA Bylaws for determining a fine for a Recruiting Rule violation. Carter testified that he must have "just cause" to fine a school, but there is no definition of "just cause" in the rules and there are no standards by which to judge what amount of fine should be imposed. As applied to Brentwood Academy in this case, the Recruiting Rule gives no fair warning that the school could be assessed a $ 3,000 fine for a violation. No

specific fine in the TSSAA Bylaws exceeds $ 25. Brentwood Academy had inadequate notice of the range of fines which could be imposed in the unfettered discretion of the Executive Director or Board of Control.

Moreover, "probation" is never even mentioned in the TSSAA Bylaws, much less identified as an available penalty. It is, in fact, unclear as applied to Brentwood Academy in this case, what "probation" means. Carter testified at trial that probation did not mean anything as a punishment except maybe a "heightened awareness." At best, heightened awareness would also mean heightened vulnerability of Brentwood Academy. Probation has to mean something or it would not have been imposed on Brentwood Academy by the TSSAA.[25] Brentwood Academy had no fair warning or notice from the Bylaws of what exactly would be required of it during its probationary period or how probation would, in fact, work. For these reasons, applying a penalty of "probation" to Brentwood Academy in this case was arbitrary.

The Court also finds that the Recruiting Rule, as applied to Brentwood Academy, violated substantive due process because it gives no notice that strict liability will be imposed without regard to scienter. Likewise, the Recruiting Rule does not give constitutionally adequate notice that strict liability will be imposed even when a school has no knowledge of the facts upon which the violation is based. Again, the Recruiting Rule is unconstitutionally vague as applied to Brentwood Academy due to this lack of notice.

The history of the application of the "free admission" example in the interpretive commentary of the Recruiting

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[25] The August 23, 1977 letter (Plaintiff's Exhibit 88) imposes on Brentwood Academy, as the first penalty, "The entire athletic program of Brentwood Academy will be on probation for four years. If there are further violations during the probationary period, TSSAA will have no choice but to take further disciplinary action." See also Plaintiff's Exhibits 86 and 87.

Rule does not clarify the Recruiting Rule. Brentwood Academy had no access to prior precedent or knowledge about prior TSSAA rulings. Moreover, the credible evidence at trial showed that the Recruiting Rule has been inconsistently applied. For instance, the TSSAA found no violation against Father Ryan High School in a substantially similar instance of free admission. (Plaintiff's Exhibit 127).

In addition, Bernard Childress and Gene Menees, Assistant Executive Directors of the TSSAA, testified that the principals of two schools can simply agree to grant students free admission to games notwithstanding Question 4, Example 7 of the interpretive commentary of the Recruiting Rule. The history of arbitrary and selective enforcement of the Recruiting Rule makes the Recruiting Rule more, rather than less, vague as applied in this case.[26]

Several defense witnesses testified that the remedy for any questions about the Recruiting Rule is to "just pick up the telephone" and call Ronnie Carter of the TSSAA. Constitutional rights, however, do not pivot on telephone calls. In addition, Ronnie Carter testified that any advice that he gives by telephone is non-binding on the TSSAA or him and cannot be relied upon as a defense to a violation of the Recruiting Rule.

For the reasons described above, the Court finds that the Recruiting Rule as applied to Brentwood Academy in this case violates the substantive due process guarantee of the *Fourteenth Amendment.* Judgment shall enter for Brentwood Academy against the TSSAA on the *Fourteenth Amendment* substantive due process "as applied" claim regarding the complimentary tickets.[27]

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[26] The lack of notice and history of selective enforcement also "tilts" the "level playing field," contrary to the TSSAA's stated governmental interest in competitive equity.

[27] For the reasons stated previously regarding the *First Amendment* "as applied" claim, the *Fourteenth Amendment* substantive due process

C. Procedural Due Process

The Court finds as a matter of fact, and concludes as a matter of law, that the TSSAA Board of Control considered ex parte, post-hearing evidence during its private deliberations, to which Brentwood Academy had no right of reply, in violation of the procedural due process rights of Brentwood Academy.

As discussed above, after the final hearing, the Board of Control deliberated in private, outside the presence of Brentwood Academy. During the private deliberations, the Board of Control received, considered, and relied upon ex parte statements and documentary evidence from Defendant Carter and two TSSAA employees who investigated the allegations against Brentwood Academy: Gene Menees and Bernard Childress. Brentwood Academy had no opportunity to reply to this ex parte evidence or even hear it and was prejudiced by the evidence and the private post-hearing process.

Bernard Childress and Gene Menees, Assistant Executive Directors of the TSSAA, participated in the investigation of the alleged violations, and the details of their investigation were not disclosed to Brentwood Academy prior to the final hearing. Mr. Childress testified that at the direction of Ronnie Carter, he interviewed Jacques Curry and others at East Middle School about Bart King allegedly recruiting Curry and others to attend Brentwood Academy. Childress also talked to coaches at Cameron and Goodlettsville Middle Schools about alleged recruiting of students by John Patton and King. Curry told Childress that he was recruited by several other private schools. Childress never talked to Bart King or John Patton or investigated the other schools.

"as applied" claim, regarding the complimentary tickets, against Defendant Carter, individually, is dismissed.

Childress testified that, at the first appeal, Brentwood Academy asked to cross-examine Childress, but Ronnie Carter refused by stating that the hearing was a meeting of "school people" about "school issues" and not a court.

Childress further testified that during the private deliberations after the final hearing, the Board of Control members asked Childress questions and he answered the questions. Childress was "sure" that questions were asked by the Board of Control and that Childress answered the questions during the private deliberations. Finally, Childress testified that Carter informed the Board of Control at the final appeal hearing that "everything was open" and that the Board of Control was not bound by Carter's previous decisions or penalties.

Menees[28] testified that he interviewed coaches at Neely's Bend Middle School, which is not a member of the TSSAA, and student Jesse Kellogg. Menees said he never talked to Bart King because "we are school people dealing with school people." Menees testified that during the private deliberations of the Board of Control he did not answer questions, but he does not contest that the Board of Control had copies of his investigative notes at or before the deliberations. He stated that there is animosity between public and private schools in the TSSAA regarding athletics.

Carter testified that during the private deliberations after the final hearing, Carter, Menees and Childress were all present to answer questions from the Board of Control. Carter does not "recall" any questions that were asked and answered or many of the key events in question. Carter testified that the hearings are not a "burden of proof setting" but instead are where "school people" decide how to solve "school problems." He testified that he informed the

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[28] Menees' sister is Ronnie Carter's assistant and his brother-in-law was a coach at Hunters Lane High School for which Neely's Bend is a feeder school.

Board of Control that his decision was "wiped out" and that the decision by the Board of Control was to be "totally new." Carter testified at trial that he was aware during the appeals that courts previously had held that the TSSAA is a state actor.

On the other hand, Board of Control member Mike Hammond testified that the Board of Control, in its private deliberations, considered evidence presented by Menees and Childress and that Carter advised and answered questions. Mickey Dunn, also a Board of Control member, stated that Childress discussed his interviews of witnesses and that Carter and Childress answered questions during the private deliberations. Board of Control member Morris Rogers testified that Carter, Menees and Childress all answered questions posed by the Board of Control during its private deliberations. Finally, Board of Control President Mike Reed testified that Childress and Menees provided information, including the results of witness interviews, to the Board of Control during the private deliberations. Bart King, according to Reed, was discussed and King was a factor in the penalties imposed.[29] The Court credits this evidence based on the demeanor of the witnesses, the consistency of the testimony, and because the testimony is adverse to the witnesses' interests as TSSAA Board of Control members.

Finally, Tom Nebel, an attorney for Brentwood Academy during the administrative appeals, testified that Brentwood Academy did not hear the evidence presented in

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[29] There was no indication from the TSSAA before the final hearing, however, that the organization was still considering the Bart King allegations. (*See, e.g.*, August 14, 1997 letter from Carter to Brown (Plaintiff's Exhibit 87); Carter testimony; Defendant's Answer at P 70 (Docket No. 8)). Thus, the TSSAA and Carter misled Brentwood Academy about a person and allegation which ultimately mattered to the decision. Brentwood Academy was denied an opportunity to defend this allegation head on.

the private post-hearing deliberations. Nebel further testified that Brentwood Academy had not seen Gene Menees' notes or Bernard Childress' notes before the final appeal. (Plaintiff's Exhibits 93-96). He stated that Carter refused to tell Brentwood Academy who was "singling out" students for athletic purposes, and Brentwood Academy did not know what evidence Carter's decision was based upon. Carter admitted at trial that he never told Brentwood Academy the names of its accusers. According to Nebel, Carter advised him that Brentwood Academy had the burden of proof during the appeals. Nebel advised the Board of Control at the final hearing that Bart King was present to testify if the Board of Control wanted King's testimony. The transcript reveals that Carter answered "no," and King did not testify at the hearing. (Transcript of Proceedings on August 23, 1997 before the TSSAA Board of Control, at 90-91 (Plaintiff's Exhibit 134)).

As discussed previously, for purposes of due process, Brentwood Academy had a property interest in the three thousand dollar ($ 3,000) fine levied against it by the TSSAA, as well as certain post-season tournament revenues. Therefore, the TSSAA was required to comply with procedural due process before depriving Brentwood Academy of that property interest.

Brentwood Academy was deprived of its property interests immediately upon issuance of the July 29, 1997 letter (Plaintiff's Exhibit 88) from the TSSAA since the penalties were effective immediately. The two appeals by Brentwood Academy of the July 29, 1997 penalties were, therefore, post-deprivation hearings for purposes of the *Fourteenth Amendment* due process.

Defendants contend that procedural due process, in this context, only required the "right-of-reply" type of hearing discussed in pre-deprivation cases. *See Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985). As the penalties imposed in this case took

effect, depriving Brentwood Academy of its property interests, immediately upon issuance of the July 29, 1997 letter from the TSSAA, however, the Court is not persuaded that the final hearing before the Board of Control was a "pre-deprivation" hearing. Consequently, the "right-of-reply" line of cases is not necessarily applicable here.

Even if those cases were applicable, however, a meaningful right-of-reply hearing is impossible if the plaintiff is not informed of the evidence considered by the decision-maker. *See, e.g., Loudermill*, 105 S. Ct. at 1495 ("The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." (emphasis added)); *Moore v. Board of Education of the Johnson City Schools*, 134 F.3d 781, 785-86 (6th Cir. 1998)("[The plaintiff] received written notice of the charges against her, as well as an explanation of the Board's evidence, and was offered an opportunity to present her side of the story." (emphasis added)); *Duchesne v. Williams*, 849 F.2d 1004, 1005 (6th Cir. 1988)(Plaintiff permitted to cross examine employer's witnesses at pre-termination hearing).

With exceptions not applicable here, "ex parte presentation of evidence denies due process. . ." *Swank v. Smart*, 898 F.2d 1247, 1253 (7th Cir. 1990) (citing *Greene v. McElroy*, 360 U.S. 474, 496-97, 79 S. Ct. 1400, 1413-14, 3 L. Ed. 2d 1377 (1959)). "A fair hearing includes the right to be shown the evidence on which the tribunal has relied . . . including evidence pertaining to the gravity of the sanction to be imposed when liability is conceded." *Swank*, 898 F.2d at 1256 (citations omitted). See also *Newsome v. Batavia Local School District*, 842 F.2d 920, 927-28 (6th Cir. 1988)(advising the decision-maker of evidence during closed deliberation session deprived plaintiff opportunity to rebut the evidence and "amounted to a clear deprivation of his right to procedural due process of law."); *Fraternal Order of Police v. Tucker*, 868 F.2d 74, 80 (3rd Cir. 1989)(*Loudermill*

requires a meaningful pre-termination hearing which must include "a sufficient explanation of the employer's evidence to permit a meaningful response."); *American-Arab Anti-Discrimination Committee v. Reno*, 70 F.3d 1045, 1069 (9th Cir. 1995) ("...the very foundation of the adversary process assumes that use of undisclosed information will violate due process because of the risk of error.").

The Court also is not persuaded by the Defendants' contention that the type of hearing in this case, among "school people about school issues" is deserving of less process than that involved in the cases cited above. In *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 902, 47 L. Ed. 2d 18 (1976), the Supreme Court devised a policy-oriented analysis that balances three competing factors in determining whether proposed procedural safeguards should be required: (1) the private interest that will be affected by the official action; (2) the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the fiscal and administrative burden that the additional or substitute procedural requirements would entail.

Applying *Matthews* here, the Court concludes that requiring the TSSAA to present its evidence of a rules violation in the presence of the school alleged to have committed the violation is a fundamental procedural safeguard that would have imposed no, or a very modest, additional administrative burden on the organization, and would have "contributed substantially to the making of a rational decision. . ." *Swank*, 898 F.2d at 1255. Moreover, it is clear that the ex parte, post-hearing evidence was unfairly prejudicial to Brentwood Academy. For instance, the President of the TSSAA, Mike Reed, testified that the ex parte, post-hearing evidence from Childress and Menees affected the overall penalty, especially the fine and probation. The missing procedural safeguards, therefore,

had a high value and were necessary to protect the constitutional interests of Brentwood Academy.[30]

For the reasons described above, the Court concludes that the Defendants violated Brentwood Academy's right to procedural due process under the *Fourteenth Amendment*, and judgment shall enter for Brentwood Academy on that claim.

Given the above finding that the TSSAA and Ronnie Carter have violated Brentwood Academy's procedural due process rights, the Court does not reach the other alleged procedural due process violations asserted by Brentwood Academy.

D. Qualified Immunity

Defendant Ronnie Carter has asserted a qualified immunity defense for the claims against him individually. Carter testified that he was personally aware that courts had previously held that the TSSAA is a state actor for purposes of 42 U.S.C. § 1983. Carter actively participated in and helped manage the hearing process. Carter also provided ex parte information to the Board of Control during its private deliberations by answering questions posed by members of the Board of Control.

The Court finds that Defendant Carter, as an employee of a private athletic association, is not entitled to qualified immunity from suit by Brentwood Academy charging a violation of 42 U.S.C. § 1983 and the Constitution. Judicial history does not reveal a firmly rooted tradition of immunity applicable to employees of private athletic associations, and the purposes of the qualified immunity doctrine do not warrant immunity for employees of private athletic

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[30] In addition, Carter testified that after the final appeal hearing, a school can ask to appear before the Board of Control again. Nothing in the TSSAA's Bylaws provides for such a right, and Brentwood Academy had no fair notice in the Bylaws of the availability of such a procedure. In any event, Brentwood Academy has exhausted any required administrative remedies.

associations. *Richardson v. McKnight*, 521 U.S. 399, 138 L. Ed. 2d 540, 117 S. Ct. 2100 (1997).[31]

In any event, the Court finds that Defendant Carter is not entitled to qualified immunity on Brentwood Academy's procedural due process claim. When qualified immunity is asserted, the Court must conduct a two-step inquiry. The first step is to decide whether the Complaint alleges a violation of a constitutionally protected right. *Saucier v. Katz*, 533 U.S. 194, 150 L. Ed. 2d 272, 121 S. Ct. 2151 (2001). The Complaint in this case alleges a violation of a constitutionally protected right, procedural due process, for the reasons stated above. The second step is to ask whether the right was "clearly established" at the time of the violation. *Hinchman v. Moore*, 312 F.3d 198, 205 (6th Cir. 2002). In this case, the contours of procedural due process were sufficiently clear and apparent that Carter had fair warning, and reasonably should have understood, that what he did violated the procedural due process rights of Brentwood Academy. Carter testified that he was aware that the TSSAA had been declared a state actor subject to the Constitution prior to the hearing. For the reasons described previously regarding procedural due process, it was clearly established prior to this case that presentation and consideration of ex parte, post-hearing evidence violates procedural due process.[32] Carter acted objectively

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[31] The Court is not persuaded that Defendant Carter's reliance on the Sixth Circuit's decision in *Bartell v. Lohiser*, 215 F.3d 550 (6th Cir. 2000) requires a different result. The Lohiser Court held that a private foster care contractor and private social workers who contracted with the state to provide a recommendation about whether a mother was fit to parent were entitled to qualified immunity. 215 F.3d at 555-57. The court concluded that the Defendants were private persons performing a discrete public service task at the express direction and under close supervision of the state. *Id.*, at 557. Carter has not made such a showing in this case.

[32] In the event the Court of Appeals determines that qualified immunity could apply, this Court would find that Defendant Carter is entitled to qualified immunity on Brentwood Academy's *First*

unreasonably in light of Brentwood Academy's clearly established right to procedural due process and, therefore, is not entitled to qualified immunity.

E. Damages.

Brentwood Academy seeks damages for the cost of repairing its reputation because it has been characterized wrongly as a "cheater" in the media. It also seeks compensation for the time that its employees have spent on matters arising from this litigation over the last five years. The damages claimed exceed six hundred thousand dollars ($ 600,000).

Carlton Flatt testified that he has spent between 300 to 400 hours on this case in the last five years. John Van Mol, an expert witness, stated that it would take a $ 350,000 media campaign to fix Brentwood Academy's reputation. Tom Seigenthaler, also an expert witness, estimated $292,000 in media damages. Mark McFerran, Director of External Affairs at Brentwood Academy, estimated that he has spent 900 hours on this matter and that his assistant, Leah Hoskins, has spent 620 hours on it. McFerran also testified that Brentwood Academy has paid Steve Brumfield $ 115,000 of $ 159,000 owed for media consulting. Curtis Masters, who became Headmaster for Brentwood Academy in July, 2002, testified that the school's reputation has been harmed significantly by media reports. The harm has impacted image, admissions, alumni, new faculty, donations and all other aspects of the life of the school, according to Masters.

In order to recover damages under Section 1983, Brentwood Academy must prove, by a preponderance of the evidence, that the Defendants' actions or inactions proximately caused the injuries and damages sustained by Brentwood Academy. A proximate cause is a cause which,

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Amendment claim. Brentwood Academy's *First Amendment* rights regarding the TSSAA were not clearly established prior to this litigation.

in natural and continuous sequence, produces the injury, and without which the injury would not have occurred. *See, e.g.*, T.P.I. 3-Civil 3.20. A wrongful act gives rise to no liability for damages unless it is the proximate cause of the injury of which Brentwood Academy complains. *Id.*

The Court finds that the damages claimed by Brentwood Academy were not proximately caused by Defendants TSSAA or Ronnie Carter.

The damage to Brentwood Academy's reputation was caused by non-party media reports. Neither the TSSAA nor Ronnie Carter controls the media.

The costs of employees working on matters arising from this litigation are the price of litigation that Brentwood Academy caused when it filed this case.

As discussed above, the Court has found that the Recruiting Rule, as applied to Brentwood Academy by the TSSAA, is unconstitutional in violation of the *First Amendment* and the *Fourteenth Amendment to the Constitution.* The Court also has found that Brentwood Academy's substantive and procedural due process rights under the *Fourteenth Amendment* were violated. The appropriate remedy for these violations of Brentwood Academy's constitutional rights is to enjoin the penalties imposed by the TSSAA. Accordingly, the August 23, 1997 penalties (Plaintiff's Exhibit 88) imposed by the TSSAA against Brentwood Academy are void and enjoined.[33]

F. Other Constitutional Claims.

Brentwood Academy has alleged that the Recruiting Rule, "as written and as applied to Brentwood Academy, violates the equal protection guarantee under the *Fourteenth Amendment.*" Joint Proposed Pre-Trial Order

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[33] The penalties imposed by the TSSAA on Brentwood Academy (Plaintiff's Exhibit 88) were not itemized by type of violation. All sanctions imposed, therefore, must be set aside to ensure that Brentwood Academy's constitutional rights are not infringed.

(Docket No. 279, p. 5); Amended Complaint (Docket No. 205, Count VII). The equal protection claim has not been addressed by the Court of Appeals because the claim was added by Amended Complaint after this case was remanded to this Court.

Brentwood Academy has also alleged that the Recruiting Rule "as written" violates the "substantive due process guaranteed under the *Fourteenth Amendment.*" Joint Proposed Pretrial Order (Docket No. 279, p. 5); Complaint (Docket No. 1, Count II). It is unclear whether the Court of Appeals definitively ruled on this substantive due process "facial challenge" when it held that the Recruiting Rule did not violate the *First Amendment* on its face.[34]

It is axiomatic that a Court should not rule upon constitutional questions unnecessarily. *See, e.g., Olympic Arms v. Buckles*, 301 F.3d 384, 388 (6th Cir. 2002). Given the other rulings of this Court in favor of Brentwood Academy, it is unnecessary for the Court to reach the equal protection ("as written and as applied") and substantive due process ("as written") issues. Accordingly, the Court declines to make findings of fact or conclusions of law on these issues.

G. State Law Claim.

Brentwood Academy has alleged that the TSSAA's conduct towards Brentwood Academy "violates Tennessee state law prohibiting unfair, unreasonable, arbitrary and oppressive action." Joint Proposed Pre-Trial Order (Docket No. 279, p. 5); Complaint (Docket No. 1, Count VI). The

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[34] The Court finds that the TSSAA Executive Director, the Assistant Executive Director, and the Board of Control members gave inconsistent and contradictory testimony about how to interpret and apply the Recruiting Rule and the interpretive commentary. Compare the testimony of Mike Hammond, Mickey Dunn, Morris Rogers, Ronnie Carter, Mike Reed, Robert Baldridge, Bernard Childress and Gene Menees.

Tennessee law on "unfair, unreasonable, arbitrary and oppressive action" is not clearly developed. *See, e.g., Nashville St. Ry. v. Griffin*, 104 Tenn. 81, 57 S.W. 153 (Tenn. 1900); *Underground II v. City of Knoxville*, 1998 Tenn. App. LEXIS 78, 1998 WL 46447 (Tenn. Ct. App. Feb. 4, 1998). Pursuant to 28 U.S.C. § 1367, the Court declines to exercise supplemental jurisdiction over the state law claim because it raises novel issues of state law. Accordingly, the Court does not make findings of fact or conclusions of law on this issue.

III. SUMMARY

For the reasons described above, the Court finds that judgment shall enter for Brentwood Academy against the TSSAA on the *First Amendment* "as applied" claim; the *Fourteenth Amendment* Substantive Due Process "as applied" claim; and the *Fourteenth Amendment* Procedural Due Process claim.

Judgment shall enter for Brentwood Academy against Ronnie Carter, individually, on the *Fourteenth Amendment* Procedural Due Process claim. Judgment shall enter for Ronnie Carter, individually, on the *First Amendment* "as applied" claim and the *Fourteenth Amendment* Substantive Due Process "as applied" claim.

It is unnecessary for the Court to reach the *Fourteenth Amendment* Equal Protection "as written and as applied" claim or the Substantive Due Process "as written" claim. The Court declines to take supplemental jurisdiction over the state law claim.

As relief for the above constitutional violations, the August 23, 1997 penalties (Plaintiff's Exhibit 88) imposed by the TSSAA against Brentwood Academy are declared void and enjoined.

The parties are again encouraged to amicably settle their differences. The parties shall advise the Court if they jointly want further Court-sponsored alternative dispute resolution.

IT IS SO ORDERED.
01-13-03
TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRENTWOOD ACADEMY,
PLAINTIFF-APPELLEE/CROSS-APPELLANT

v.

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION; RONNIE CARTER, EXECUTIVE DIRECTOR AND IN HIS INDIVIDUAL CAPACITY,
DEFENDANTS-APPELLANTS/CROSS-APPELLEES.

NOS. 03-5245/5278.

Argued: December 7, 2004.
Decided: March 17, 2006.
Filed: March 17, 2006.

Before GIBBONS and ROGERS, Circuit Judges; BELL, Chief District Judge.

OPINION

JULIA SMITH GIBBONS, Circuit Judge:

This appeal represents the third trip to this court for the parties to this litigation. The case has also been before the United States Supreme Court, which made a notable ruling that defendant-appellant Tennessee Secondary School Athletic Association ("TSSAA") was a state actor.

The parties' dispute began when the TSSAA imposed a number of penalties on plaintiff-appellee Brentwood Academy ("Brentwood") as a result of asserted violations by Brentwood of the TSSAA's rule governing recruiting of student athletes. Brentwood sued the TSSAA and its

executive director, defendant-appellant Ronnie Carter, alleging violations of the *First* and *Fourteenth Amendments*, federal antitrust laws, and Tennessee law. After the United States Supreme Court determined that the TSSAA is a state actor, this court on remand held that the recruiting rule was content-neutral and subject to intermediate scrutiny. We remanded to the district court with instructions about the proper analysis in the case on the *First Amendment* issue. The district court conducted a ten-day nonjury trial. The district court found for Brentwood on the *First Amendment* issue, holding that the application of the rule to Brentwood was not narrowly tailored to further the TSSAA's legitimate, substantial interests. The district court also found for Brentwood on its substantive and procedural due process claims against the TSSAA, as well as on its procedural due process claim against Carter in his individual capacity. The district court enjoined the TSSAA's penalties against Brentwood. The district court also held that the TSSAA was entitled to immunity from Brentwood's antitrust claims. The parties cross-appealed to this court on these issues.

For the reasons set forth below, we affirm in part, reverse in part, and remand for further proceedings.

I.

A. Factual Overview

We begin with a description of the most pertinent facts and supply additional facts as necessary in our discussion of the various issues.

The TSSAA is a voluntary association of 290 public schools and 55 independent and parochial schools from across the state of Tennessee. The TSSAA is organized as a non-profit corporation under Tennessee law, with the purpose of stimulating and regulating interscholastic athletic competition among its member schools. Its governing entity is the Board of Control. As noted in the

Supreme Court's decision in this case, the Tennessee State Board of Education, beginning in 1925, explicitly acknowledged the TSSAA's functions "in providing standards, rules and regulations for interscholastic competition in the public schools of Tennessee." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 292, 121 S. Ct. 924, 148 L. Ed. 2d 807 (2001). In 1972, the Board designated the TSSAA as "the organization to supervise and regulate" interscholastic athletics and specifically approved the TSSAA's rules and regulations, including the recruiting rule. *Id.* In 1996, the Board dropped the rule expressly designating the TSSAA as regulator but did not change its relationship with the organization. *Id.* at 29293. At all times relevant to the present case, Ronnie Carter served as executive director of the TSSAA.

Brentwood Academy is an independent school in Brentwood, Tennessee, and a member of the TSSAA. In 1998, the school had about 520 students in grades six through twelve. Brentwood's athletic teams, especially its football team, have been very successful in interscholastic competitions, even though its enrollment is smaller than many of its competitors. At the time of the events in question, Brentwood's Headmaster was Bill Brown; the Athletic Director and Head Football Coach was Carlton Flatt; and the Director of Admissions was Nancy Brasher. Brentwood paid a fee to the TSSAA to renew its membership on an annual basis.

The TSSAA has promulgated a "recruiting rule" in order to regulate the attempts of secondary schools to recruit middle school student athletes for athletic programs. The rule, found in the TSSAA's Bylaws, reads:

> The use of undue influence on a student (with or without an athletic record), his or her parents or guardians of a student by any person connected, or not connected, with the school to secure or to retain

a student for athletic purposes shall be a violation of the recruiting rule.

The bylaws also include a number of questions and answers and other guidelines that are known as interpretive commentary. While these are meant to aid in the interpretation of the recruiting rule, they are not binding on the TSSAA Board of Control. Carter agreed that the recruiting rule itself is "all that really counts, everything else underneath it, the interpretative commentary is discretionary and it depends on the totality of the circumstances."

Excerpts from the interpretive commentary include the following:

1.

Q. How is undue influence interpreted in the recruiting rule?

A. A person or persons exceeding what is appropriate or normal and offering an incentive or inducement to a student with or without an athletic record.

. . .

3.

Q. Is it permissible for a coach to contact a student or his or her parents prior to his enrollment in the school?

A. No, a coach may not contact a student or his or her parents prior to his enrollment in the school. This shall apply to all students whether or not they have an athletic record.

4.

Q. What are some of the guides [sic] used in determining whether there has been undue influence used which would result in a violation of the recruiting rule?

A. Some examples are, but not limited to:

3. Any initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/athlete enrolled in any member school except where there is a definite feeder pattern.

4. Any initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/athlete in the seventh grade and above at any non-member school except where there is a definite feeder pattern involving the schools.

...

Private...schools may not contact students enrolled at the public schools. Public schools may not contact students enrolled at the private schools.

...

7. Admitting students to athletic contests free of charge when there is an admission being charged at the contest except where there is a definite feeder pattern involved with the school.

The "definite feeder pattern" exception does not apply to Brentwood, except with regard to those students who are enrolled at Brentwood Academy itself in the sixth grade or higher.

In some form, the recruiting rule has been in effect at least since the early 1950s and probably earlier. It has undergone various changes; the auxiliary questions and answers and guidelines were added during the 1980s and 90s.

In 1997, a number of coaches at public high schools that were TSSAA members reported various alleged recruiting violations by Brentwood to the TSSAA. On behalf of the TSSAA, Carter and other TSSAA officials began an investigation into the allegations. During the investigation, Brentwood supplied Carter with a copy of a letter Flatt sent to various eighth grade boys in April 1997 as well as information regarding phone calls Flatt made to the families of the boys to whom the letter was sent. The letter read, in part:

> Having officially enrolled at Brentwood Academy, the TSSAA allows you to participate in spring football practice. If you are not currently involved in a sport at your school, we would like to invite you to practice with your new team.... Due to the inconvenience to your parents, please do not feel that you must attend every practice. However, I do feel that getting involved as soon as possible would definitely be to your advantage... We are certainly glad that you decided to become an *Eagle*.

The letter was signed, "Your Coach, Carlton Flatt." This letter was sent to all incoming ninth grade male students who had applied, been tested and admitted, and signed enrollment contracts with Brentwood.[1] Flatt testified that

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[1] Headmaster Brown later testified that those students who sign such contracts (and paid the accompanying $300 deposit), in his mind, were

after the letter was mailed, he received "a couple of phone calls" from parents of boys who received the letter with questions about the letter and the necessity of the boys attending practice. As a result of these calls, Flatt decided to call each of the families of the boys who received the letter to clarify that the spring practice was not mandatory and should not trump any other academic or athletic responsibility the boys might have. All twelve boys who received the letter ended up attending spring practice.

The TSSAA also investigated allegations that tickets for a Brentwood football game provided by Flatt to a middle school coach were used by some of the coach's student athletes to attend the game for free. As the TSSAA put it, these tickets were "made available to uncontrolled individuals" in a way that facilitated "the possibility for abuse." Flatt later testified that he had told the coach that the tickets were not to be used to provide free admission to middle school students. The middle school coach nonetheless allowed two of the free tickets to be used by two of his students.

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officially enrolled at Brentwood and committed to come. The TSSAA, however, contends that the term "enrolled" (as used in the recruiting rule) is defined in the TSSAA Bylaws, under Article II (Eligibility Rules), Section 1 (Academic Rules):

> To be eligible to participate in athletic contests during any semester... (b) Students shall be regularly enrolled, in regular attendance, and carrying at least five full courses. A student shall be considered as regularly enrolled after the student has attended for three days, has engaged in three or more days of football, girls volleyball, cross country, golf or girls soccer practice during the period on or after August 1, or has participated in an athletic contest in any sport.

There was some testimony at trial indicating that a few students every year do not end up attending Brentwood even after signing the enrollment contracts.

Carter notified Brentwood by letter dated July 29, 1997, that the TSSAA had found Brentwood guilty of multiple violations of TSSAA rules. The letter informed Brentwood of various penalties that would be assessed as a result of the rules violations. Brentwood requested a hearing with Carter and members of the TSSAA Board of Control; a hearing was held on August 13, 1997, at which Headmaster Brown and representatives of Brentwood made a presentation regarding the allegations and determinations in the July 29 letter. Following the hearing, Carter again sent a letter to Brown providing more specific information about the violations and penalties to be assessed against Brentwood. Pursuant to the TSSAA Bylaws, Brentwood appealed the penalties to the full Board of Control, which is charged with enforcing the TSSAA Bylaws. Another hearing was held on August 23, 1997. In an August 23, 1997, letter that represented the final TSSAA decision on the matter, the Board notified Brentwood that it had found that Brentwood, and specifically Flatt, violated the recruiting rule in two ways: (1) by granting free admission to a Brentwood football game to two eighth grade athletes from another school; and (2) by sending letters and making phone calls to eighth grade boys at other schools regarding spring football practice at Brentwood.[2] The Board also cited Brentwood for conducting impermissible off-season practice with certain Brentwood student-athletes, but this alleged rule violation is not an issue in this appeal. As a result of these violations, the Board imposed numerous penalties, including a four-year probation for Brentwood's entire athletic program, suspension of playoff eligibility for the

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[2] To be clear, the alleged violation of the recruiting rule was the *invitation* to attend football practice, not the practice itself. It is undisputed that in 1997, participation by incoming Brentwood students in spring football practice was permissible under TSSAA rules. The rule was subsequently changed to prohibit such participation.

Brentwood football and boys' basketball teams, and a $3,000 fine.

B. Procedural History

Brentwood sued the TSSAA and Carter (in his official and individual capacities) on December 12, 1997, alleging that the TSSAA violated the *First* and *Fourteenth Amendments*; the Sherman Act, 15 U.S.C. § § 12; and Tennessee law. On July 29, 1998, the district court found that the TSSAA and Carter were state actors and granted summary judgment to Brentwood on its *First Amendment* claim brought under 42 U.S.C. § 1983. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 13 F. Supp. 2d 670 (M.D. Tenn. 1998). The TSSAA appealed that decision, and the Sixth Circuit reversed, on the basis that the TSSAA is not a state actor and thus not subject to suit under § 1983. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 180 F.3d 758 (6th Cir. 1999). The United States Supreme Court granted certiorari and reversed the Sixth Circuit, holding that "the association's regulatory activity may and should be treated as state action owing to the pervasive entwinement of state school officials in the structure of the association." *Brentwood Acad.*, 531 U.S. at 291.

On remand from the Supreme Court, this court considered the merits of the TSSAA's appeal. This court reversed the decision of the district court granting summary judgment to Brentwood and remanded the case to the district court, holding that: (1) Brentwood did not waive its right to challenge the recruiting rule by voluntarily joining the TSSAA; (2) the recruiting rule is not facially overbroad; and (3) the district court erred by subjecting the recruiting rule to strict scrutiny, because it is content-neutral. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 262 F.3d 543 (6th Cir. 2001). This court remanded to the district court with instructions to: (1) determine whether the TSSAA's asserted substantial state interests for the

recruiting rule were legitimate; (2) determine whether the application of the rule to Brentwood was narrowly tailored to further the TSSAA's legitimate state interests; and (3) address Brentwood's claims against Carter in his official and individual capacities. *Id.* at 558.

After remand and prior to trial, on October 25, 2002, the district court granted partial summary judgment to defendants on Brentwood's antitrust claims, reasoning that since TSSAA is an organization "pervasively entwined" with the state, it is entitled to antitrust immunity under *Parker v. Brown*, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943).

In December 2002, the district court held a bench trial and considered the issues addressed by this court in its 2001 opinion, as well as Brentwood's substantive due process, procedural due process, equal protection, and Tennessee state law claims. The court issued a memorandum opinion and order on January 13, 2003, finding: (1) for Brentwood on its *First Amendment*, substantive due process, and procedural due process claims against the TSSAA; (2) for Brentwood on its procedural due process claim against Carter in his individual capacity; and (3) for Carter with regard to Brentwood's *First Amendment* and substantive due process claims against Carter in his individual capacity. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 304 F. Supp. 2d 981 (M.D. Tenn. 2003). The court held that Carter was not entitled to qualified immunity on Brentwood's procedural due process claim but that he would be entitled to qualified immunity on Brentwood's *First Amendment* claim. The court declined to reach the equal protection or state law claims, and it refused to award damages to Brentwood. As relief for Brentwood, the court enjoined the penalties imposed by the TSSAA against Brentwood in 1997.

On February 10, 2003, the TSSAA and Carter appealed the January 13, 2003, order to this court. On February 24,

2003, Brentwood cross-appealed, taking issue with: (1) the district court's October 2002 order granting partial summary judgment to defendants on the antitrust claims; and (2) the relief provisions of the January 13, 2003, order.[3]

II. ANALYSIS OF THE ISSUES

This court reviews a district court's findings of fact for clear error. *See Waxman v. Luna*, 881 F.2d 237, 240 (6th Cir. 1989). However, conclusions of law, questions of mixed law and fact, and "findings of ultimate facts which result from the application of legal principles to subsidiary factual determinations" are all subject to *de novo* review. *Id.* (citation and quotation marks omitted); *see Cordrey v. Euckert*, 917 F.2d 1460, 1465 (6th Cir. 1990).

A. The TSSAA's Reliance on Its Contractual Relationship with Its Members

Permeating the TSSAA's arguments[4] on both the *First Amendment* and due process issues is its contention that rulings by the district court "ignored the constitutionally critical fact that the relationship between TSSAA and [Brentwood] arose entirely from a membership contract that [Brentwood] renewed each year." In other words, according to the TSSAA, "every argument of [Brentwood] and every ruling by the District Court relies [sic] on the false premise that TSSAA is the sovereign State exercising police power rather than a state actor that asks its members to honor its voluntary contractual obligations." Prior to undertaking analysis of the *First Amendment* claim, we must address this argument as it relates to that claim.

There is a short answer to the TSSAA's argument with regard to the *First Amendment* claim. The answer is that it

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[3] Brentwood did not appeal the district court's conclusions regarding Brentwood's equal protection or state law claims. Nor did it appeal the district court's dismissal of Brentwood's *First Amendment* and substantive due process claims against Carter in his individual capacity.

[4] For the sake of convenience and clarity, we refer to the defendants collectively as "TSSAA" throughout this section of the opinion.

is inconsistent with the law of the case and this court's 2001 opinion. In the 2001 opinion this court outlined the *First Amendment* analysis to be employed by the district court on remand. *See Brentwood Acad.*, 262 F.3d at 557-58. The underpinning of that analysis is that the TSSAA's role in this case is that of a governmental entity exercising regulatory authority and that the recruiting rule must be considered a content-neutral rule subject to intermediate scrutiny. The court noted with particularity that the recruiting rule was analogous to zoning ordinances and limitations on noise, posting of signs, and distribution of religious literature that have been upheld as reasonable time, place, and manner restrictions. *Id.* at 553-54. The panel in the 2001 decision instructed the district court on remand to determine whether the recruiting rule is narrowly tailored to meet TSSAA's substantial interests. *Id.* at 558. It noted that this question could not be decided in the abstract as a matter of law and contemplated that TSSAA would present evidence to justify the need for its regulations. *Id.* The panel was quite clear in outlining the district court's task on remand.

The TSSAA's reasoning invites us to stray from the 2001 panel's road map and follow another analytical route it deems more favorable to its position. In making its argument, it suggests that two lines of *First Amendment* cases — unconstitutional conditions cases represented by cases such as *Board of County Commissioners v. Umbehr*, 518 U.S. 668, 116 S. Ct. 2342, 135 L. Ed. 2d 843 (1996), and government employee speech cases such as *Pickering v. Board of Education*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968) — provide the correct analytical framework. Both lines of cases were mentioned by the panel in its 2001 opinion but in a context different from that in which the TSSAA now urges that they apply.

One argument made by the TSSAA in 2001, bearing substantial resemblance to its present position, was that

Brentwood "waived its right to question the constitutionality of the recruiting rule because, by voluntarily choosing to be a member of TSSAA, it has agreed to abide by the rules of the organization." *Brentwood Acad.*, 262 F.3d at 549. This court rejected that argument, reasoning that "the Supreme Court's rulings that parties do not give up *First Amendment* rights by contracting with, or being employed by, a public agency forecloses [sic] TSSAA's argument that Brentwood gave up its right to challenge the constitutionality of the recruiting rule because it voluntarily joined TSSAA." *Id.* at 550-51 (citing *Umbehr* and *Pickering*). While *Umbehr* and *Pickering* may have given guidance in disposing of the waiver argument, the 2001 opinion in no way indicates that they govern the analysis on remand as to whether the TSSAA's application of the recruiting rule to Brentwood violated its *First Amendment* rights.

Our agreement or disagreement with the 2001 panel decision is not at issue here. We have no authority to overturn a prior published decision of this court, *see Darrah v. City of Oak Park*, 255 F.3d 301, 309 (6th Cir. 2001), and, moreover, that decision is the law of the case, *see Scott v. Churchill*, 377 F.3d 565, 569-70 (6th Cir. 2004). While courts have some discretion in following the law of the case doctrine, *see id.* at 570, this protracted and contentious litigation presents a compelling situation for its application. In order to maintain the integrity of the judicial process, an appellate court cannot change its mind as to the proper analysis after it has remanded a case for trial and the district court has tried it, giving its best effort to adhere faithfully to the appellate court instructions. We should properly review the district court's decision, but we cannot change the rules after the fact. *See United States v. Campbell*, 168 F.3d 263, 265 (6th Cir. 1999) ("Determinations of the court of appeals of issues of law are binding on both the district court on remand and the court of

appeals upon subsequent appeal."). This stance properly defers to the precedent set by the prior panel and recognizes that the parties and the district court must be able to rely on this court's prior rulings in trying the case.[5]

While this court's 2001 ruling provides the definitive answer to the *First Amendment* argument based on the TSSAA's contractual relationship with its members, we note also that clear problems exist with the manner in which the TSSAA seeks to apply the "unconstitutional conditions" doctrine. The TSSAA relies on *Umbehr* to argue that the "unconstitutional conditions doctrine specifically allows a state agency to impose conditions, even on fundamental rights like free speech, when those conditions are reasonably necessary to accomplish the objectives of the contract." This is not an accurate reading of *Umbehr*, which held that the *First Amendment* limits the government's ability to terminate relationships with independent contractors because of their speech. *See* 518 U.S. at 673-74. Moreover, *Umbehr*, in which the Court addressed only the narrow issue of "whether, and to what extent, independent contractors [with the government] are protected by the *First Amendment*," *id.* at 673, is not a precisely apposite precedent anyway. *See also id.* at 685 (emphasizing the "limited nature of our decision today"). The present case does not involve the government as a party in a contractual relationship with an independent contractor, *cf. id.* at 678-79. Similarly, there are obvious differences between the

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[5] It is interesting to note that the TSSAA, in its first appeal to this court, challenged the "analytical framework that the district court used" in its initial decision. *Brentwood Acad.*, 262 F.3d at 551. We agreed with the TSSAA the last time around, holding that "the district court erred in concluding that the recruiting rule is a content-based regulation that fails strict scrutiny review" and that, rather, the recruiting rule is content-neutral and subject to intermediate scrutiny. *Id.* at 551-53. In this appeal, however, we cannot agree with the TSSAA's challenge to the analytical framework governing the case and set out by this court previously.

TSSAA's role in this case and the government's role as employer, *cf. Pickering*, 391 U.S. at 574. The TSSAA's reliance on the argument that Brentwood's speech is not a matter of public concern is thus misplaced. The requirement that speech relate to a matter of public concern in order to be protected emanates from the government employee cases in which employee speech is limited in many respects by virtue of the employer-employee relationship. *See id.* at 568 ("The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."). The public concern requirement is not a part of the intermediate scrutiny given to a content-neutral restriction on speech. The 2001 decision of this court, in discussing the waiver issue, described the way in which public interests were to be taken into account on remand. In that decision, this court observed that substantial government interests, which the TSSAA would have to establish, were of necessity matters of public concern. *Brentwood Acad.*, 262 F.3d at 551. In making this observation, it placed the public interests concept in its proper place in the framework adopted later in the opinion — on the governmental interest in promulgating the rule, not on the question of whether Brentwood's speech related to a matter of public concern. *See id.* at 557-58.

A couple of nuances in the TSSAA's argument deserve mention. The TSSAA urges the applicability of its preferred analysis by differentiating between the government's "sovereign power" and its "contractual power." In doing so, it makes much of the dicta in *Umbehr* discussing the difference between the government's "sovereign power" and its "contractual power." See 518 U.S. at 678. Reading *Umbehr* too broadly, it asserts that *Umbehr* extended the *Pickering* "public concern" framework to "any case where the government is exercising contractual power as opposed

to sovereign power." Again, the applicability of the *First Amendment* to the TSSAA's regulatory conduct does not hinge on whether there was a contract or not. Even if such a distinction between contractual and sovereign power were applicable in any meaningful way to the present case, the Court's conclusion in *Umbehr* — that some scrutiny more deferential than strict scrutiny should apply — when the government exercises contractual power — does not suggest that the *First Amendment* does not apply to the TSSAA's enforcement of its recruiting rule. *See id.* In fact, *Umbehr* suggests that the approach this court took in its previous opinion was the right one: that the *First Amendment* does apply to the rule, and intermediate scrutiny is the standard to which the rule should be subjected. *See Brentwood Acad.*, 262 F.3d at 551-54; see also *Umbehr*, 518 U.S. at 678 ("The tests that we have established in our government employment cases must be judicially administered with sensitivity to governmental needs, but *First Amendment* rights must not be neglected.").

A second nuance relates to the TSSAA's efforts to cast the present case as a "subsidy" case, where the government has considerable autonomy over how a government program is administered. This characterization is similarly futile. The defendants state in their brief that "TSSAA membership is a subsidy" and that under *Rust v. Sullivan*, 500 U.S. 173, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991), the government acting as a contractor in a subsidy context "must be able to require the contracting party to limit its speech when reasonably necessary to effectuate the purposes of the contract." Tellingly, the defendants cite to no page in the *Rust* opinion that supports this reading of the case; there is none. *Rust* involved a government funding program involving disbursements to doctors to advise patients on family planning topics. One condition of the program was that no funds could be used in programs where

abortion was presented as a method of family planning. The Court upheld the program, reasoning that Congress had "merely chosen to fund one activity to the exclusion of the other." *Id.* at 193. In later *First Amendment* jurisprudence, the Court "explained *Rust* on the understanding" that the government in that case was itself engaging in speech and could thus make viewpoint-based funding decisions. *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541, 121 S. Ct. 1043, 149 L. Ed. 2d 63 (2001); *see also United States v. Am. Library Ass'n*, 539 U.S. 194, 211-12, 123 S. Ct. 2297, 156 L. Ed. 2d 221 (2003) (plurality opinion) (citing *Rust* in upholding the government's requirement that libraries receiving federal subsidies utilize filtering software). Clearly, the TSSAA's enforcement of the recruiting rule is not a funding program. Nor does it represent government speech. Cases like *Rust* do not govern the present case.

Thus, as the 2001 panel determined, the appropriate characterization of the TSSAA's role is as a government regulator, a context to which the *First Amendment* surely applies. *See, e.g., Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 834-35, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 13031, 112 S. Ct. 2395, 120 L. Ed. 2d 101 (1992); *see also Brentwood Acad.*, 531 U.S. at 291 (holding that the association's "*regulatory* activity" is state action, even though "no school is forced to join" the TSSAA) (emphasis added); *id.* at 292-93 (noting that the Tennessee State Board of Education designated the TSSAA as "the organization to supervise and *regulate* [interscholastic] athletic activities" in Tennessee, and that the present case was triggered by a "*regulatory* enforcement proceeding") (emphasis added). The applicability of the *First Amendment* to regulation of speech by the government in this context does not vary depending on whether the speech relates to a matter of public concern or whether the relationship between the government and the speaker is voluntary or contractual.

For example, when the government regulates how and when citizens can enter into voluntary contractual relationships with the government that regulate certain speech by those citizens, the government's licensing or regulatory scheme must meet constitutional standards, regardless of whether the speech at issue involves a matter of public concern. *See Forsyth County*, 505 U.S. at 129-31; *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 552-53, 95 S. Ct. 1239, 43 L. Ed. 2d 448 (1975). The same goes for the TSSAA's application of its recruiting rule.

We thus reject the defendants' attempt to reshape the framework through which we view this case — a framework set out by this court previously and utilized by the district court in trying the case. The TSSAA, in administering its rules and regulations and imposing penalties against member schools, acts as a regulator, not as an employer, contractor, or disburser of funds. Therefore, as this court has previously concluded, Brentwood's *First Amendment* rights are at issue in this case, and intermediate scrutiny applies to the TSSAA's application and enforcement of the recruiting rule.

The dissenting opinion accepts the TSSAA's invitation to revisit previously rejected arguments and to re-characterize them as new ones. In fact, it even goes beyond the TSSAA's arguments and suggests that no *First Amendment* rights are implicated here.

The opening sentences of the dissenting opinion are conceptually attractive when first read. They are: "High school football is a game. Games have rules." Of course, games have rules. And so do cases. Here, the rule is called "law of the case." The dissent correctly notes that this dispute hardly evokes our notions of the core values of the *First Amendment*; the same could doubtless be said of other examples of *First Amendment* jurisprudence. But, in this case, the time for appellate court observation of any lack of a *First Amendment* issue was long ago.

In recycling the TSSAA's waiver argument, the dissent characterizes the 2001 panel decision as dealing with a broad issue of whether Brentwood had waived its right to sue entirely. The problem with this interpretation is that in 2001 Brentwood *had* sued and *had* challenged the same rule at issue in this appeal. The panel was discussing waiver in this context, and the clear import of its decision is that Brentwood had not waived or given up its right to challenge the rule at issue here by entering into a contract with the TSSAA.

Another difficulty with the dissent's waiver theory is that it is implicitly based on the content of the contract. Yet the contract here contains no provision that assists in the analysis. Brentwood does agree to be bound by the rules. If the TSSAA were not a state actor, that would be the end of the story. Since the TSSAA *is* a state actor, the contract gives no guidance as to whether Brentwood waived a right to challenge a rule it considered unconstitutional. The contract's silence thus becomes evidence of an absence of waiver of constitutional rights. The silence provides no basis for differentiating between a waiver of some rights and not others.

B. Application of the Recruiting Rule to Brentwood

Turning to the analysis of the *First Amendment* issue, we consider whether the TSSAA's application of the recruiting rule to Brentwood violates the *First Amendment.* In the 2001 opinion, the court laid out the intermediate scrutiny analysis that applies to content-neutral regulations:

> A regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but . . . it need not be the least restrictive or least intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial government interest that would be achieved less

> effectively absent the regulation . . . . The validity of time, place, or manner regulations does not turn on a judge's agreement with the responsible decision-maker concerning the most appropriate method for promoting significant government interests or the degree to which those interests should be promoted.

Brentwood Acad., 262 F.3d at 557 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 798-800, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989) (internal quotations, citations, footnotes, and alterations omitted)). The TSSAA has asserted three interests as justification for the recruiting rule: (1) to keep high school athletics in their proper place subordinate to academics; (2) to protect student athletes from exploitation; and (3) to foster a level playing field among the various member schools. *See id.* In its previous opinion, this court recognized the first interest as legitimate and substantial. *See id.* at 557-58 (citing *Crocker v. Tenn. Secondary Sch. Athletic Ass'n*, 980 F.2d 382, 386-87 (6th Cir. 1992)). This court remanded to the district court to determine whether the TSSAA's other two asserted substantial state interests for the recruiting rule were legitimate. *Id.* at 558.

The district court held that the TSSAA has a substantial governmental interest in protecting student athletes from exploitation. While it also held that the TSSAA's interest in fostering a "level playing field" was a legitimate governmental interest, it found that this interest was not substantial, especially considering that "the substantial governmental interest in informed school choice trumps any governmental interest in controlling which schools or teams win athletic contests." Unlike rational basis review, intermediate scrutiny does not allow a court to supplant the particular interests put forward by the state with other suppositions. *See Edenfield v. Fane*, 507 U.S. 761, 768, 113 S. Ct. 1792, 123 L. Ed. 2d 543 (1993). In determining

whether an interest is substantial, a court must look beyond "hypothesized justifications," *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373-74, 122 S. Ct. 1497, 152 L. Ed. 2d 563 (2002), and focus instead on the "actual interests served by the restriction." *Edenfield*, 507 U.S. at 768.[6]

The district court's conclusions regarding the TSSAA's interests, which we review *de novo*, were not erroneous. With regard to the asserted interest of protecting student athletes against exploitation, the TSSAA presented voluminous evidence at trial, primarily via expert witness testimony, in support of its argument that this interest is a substantial one. Carter testified that the "fundamental" reason for the recruiting rule was preventing exploitation. One of Brentwood's expert witnesses even testified that preventing the exploitation of student athletes, defined as the "selfish, unjust utilization of students for a school's benefit rather than for the benefit of the individual student," was a compelling state interest. At one point in its brief, Brentwood seems to suggest that evidence such as written legislative history or testimony from the initial drafters of the recruiting rule is necessary to prove that preventing exploitation of students was one of TSSAA's "actual" interests in applying the rule to Brentwood.[7] For the

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[6] *Edenfield* and *Thompson* are commercial speech cases, but the test they apply, just like the test applicable here, asks the court to determine whether the asserted state interests are substantial. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 564, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980).

[7] Mostly, however, Brentwood conflates the "substantial interest" prong of the intermediate scrutiny test with the "narrowly tailored" prong, conceding later in its brief that the "TSSAA has a substantial interest in preventing exploitation of students," defined as "a student...being threatened, coerced, or harassed." Brentwood's argument that there are "problems with this theory...as a justification for TSSAA's disciplinary action" against Brentwood is evaluated in the next section of this opinion, since this is an argument that the application of the rule was not "narrowly tailored" to further Brentwood's legitimate and substantial interests.

purposes of the first prong of the intermediate scrutiny test, it is only necessary to establish that the actual interest exists and is substantial, and this can be done without resort to such primary sources. While there is no known written legislative history for the recruiting rule and all of the initial drafters of the rule are dead, the evidence, especially Carter's testimony under oath, suggests that preventing the exploitation of middle school student athletes is a substantial state interest and was one of the TSSAA's "actual" interests in applying the rule to Brentwood. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 312, 120 S. Ct. 1382, 146 L. Ed. 2d 265 (2000) (Souter, J., concurring in part and dissenting in part) (quoting *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 664, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994) (plurality opinion)) (noting that the state can regulate speech to further an interest in preventing reasonably "anticipated harm," as long as the harm is real); *see also* Knight Foundation Commission on Intercollegiate Athletics, *A Call to Action: Reconnecting College Sports and Higher Education* 20-21 (2001) (noting that "high school sports today can reflect the worst of their collegiate counterparts" in terms of exploitative commercial influences, pervasive recruiting efforts, and academic compromises for student athletes focused only on a professional athletic career); *cf. Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 462, 98 S. Ct. 1912, 56 L. Ed. 2d 444 (1978) (holding that the state has an important interest in preventing solicitation by lawyers that involves undue influence, intimidation, overreaching, and other forms of "vexatious conduct").

The TSSAA also introduced evidence that supports its contention that fostering a level playing field among member schools is a legitimate state interest. Specifically, its experts and Brentwood's own Headmaster Brown testified that the recruiting prohibition helps level the playing field among schools, especially as between private schools with significant resources and public schools with

more limited resources and access to potential students. Carter testified at length about *how* the recruiting rule preserves competitive equity among schools, explaining that without the rule, "the rich would get rich real quick, and the poor would get poor real quick." There is very little, if any, evidence, however, explaining *why* competitive equity is an important value in the first place. It may be true, as defendants claim in their brief, that "maintenance of fair competition among [the TSSAA's] members lies at the core of [the TSSAA's] reason for being," but simply saying this is so does nothing to demonstrate why such a "reason for being" is a substantial state interest. State actors may act out of a variety of interests, but only some are substantial. The defendants can cite to no evidence to support the notion that ensuring that high schools compete in interscholastic sports in an equitable manner is a substantial state interest, especially when coupled with the admittedly substantial interest of ensuring that athletics do not become more important than academics at the high school level. The district court was right that this interest, while legitimate, is not substantial.[8]

Having established that the TSSAA has substantial state interests in keeping athletics subordinate to academics and preventing the exploitation of student athletes, the next question in the analysis, as set out in this court's previous opinion on the matter, is whether the recruiting rule, "as applied to Brentwood," is narrowly tailored to further those interests. *See Brentwood Acad.*, 262 F.3d at 557; *see also*

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[8] Despite our conclusion that the district court correctly found that the TSSAA had established substantial state interests in keeping athletics subordinate to academics and preventing the exploitation of student athletes, the dissent devotes considerable attention to a discussion of the type of proof a defendant might have to present to support such interests. The two opinions do not differ on the ultimate point, that is, the TSSAA did have substantial state interests at stake. The true point of departure is whether the rule "as applied to Brentwood" is narrowly tailored to further those interests. *See Brentwood Academy*, 262 F.3d at 557.

Turner Broad. Sys., 512 U.S. at 664 (plurality opinion) ("That the Government's asserted interests are important in the abstract does not mean...that the [speech regulation] will in fact advance those interests."). Specifically, the district court's task was

> to decide if the punishment exacted for these alleged violations relating to the free game tickets, spring football-practice letters, and the follow-up telephone calls was appropriate regulatory action narrowly tailored to further TSSAA's legitimate interests as a state actor....In proceeding with this case on remand, we caution both the parties and the district court to stay focused on the two alleged recruiting rule violations in question, rather than engage in a wide-ranging attack or defense of the recruiting rule as a whole.[9]

Brentwood Acad., 262 F.3d at 558. This court also noted in its previous opinion that the application of the recruiting rule must not "'unreasonably limit alternative avenues of communication.'" *Id.* at 554 (quoting *City of Renton v.*

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[9] The "two alleged recruiting rule violations" referred to here are: (1) the free game tickets and (2) the spring practice letters and follow-up calls. *See Brentwood Acad.*, 262 F.3d at 548. While this court's previous opinion considered both of these rule violations as bases for Brentwood's *First Amendment* claim, neither the initial district court opinion nor the opinion being appealed here applied *First Amendment* scrutiny to the application of the recruiting rule to the free game tickets episode. In both opinions, the district court considered only whether the application of the rule to the letters and phone calls was constitutional. Defendants state in their brief that "only the spring practice letters and phone calls formed the basis of [Brentwood]'s *First Amendment* claim."

The disconnect between this court's previous opinion and the district court's opinions on this point is likely due to the fact that, judging from its brief, Brentwood has focused its *First Amendment* claim on the punishment for the letters and calls, recognizing, perhaps, that it is unclear whether the *First Amendment* is implicated by the provision of free game tickets. Regardless, we confine our "narrowly tailored" inquiry to the letters and calls, leaving the free tickets episode to be considered under substantive due process analysis.

Playtime Theatres, Inc., 475 U.S. 41, 47, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986)). On remand, the district court held that the recruiting rule "is not narrowly tailored to further any of the three governmental interests of the TSSAA as applied to Brentwood Academy."[10]

Reviewing *de novo*, we affirm this conclusion. The defendants import a definition of "enrolled" from a separate provision in the TSSAA Bylaws to support their argument that the students contacted by the letters and calls were not truly enrolled at Brentwood and that Brentwood therefore violated the recruiting rule by contacting them. Putting aside the fact that the Bylaw provision upon which defendants rely seems to apply not to practices or recruiting but rather only to eligibility to participate in athletic contests, the defendants' contention that the students at issue were not enrolled misses the point. Considering that the interpretive commentary to the recruiting rule is not binding and serves only as a guideline, the TSSAA's use of its discretion to punish Brentwood for the letters and calls was not a narrowly tailored way to keep athletics subordinate to academics at Brentwood or ensure that the student athletes being contacted were not being exploited.[11]

First, surely, however one defines "exploitation," this interest was not furthered by punishing Brentwood. As the district court pointed out, the students contacted by the letter and calls had already signed enrollment contracts with Brentwood Academy, and the letter and calls were

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[10] Even though the district court found that fostering a level playing field was not a substantial state interest, it nonetheless included the interest in its "narrowly tailored" analysis.

[11] It is worth noting again that the district court's task was to consider the application of the recruiting rule specifically to Brentwood on these facts. The district court's opinion does not mean that application of the recruiting rule to other schools communicating in similar ways to students would be unconstitutional. For example, it is possible that letters and calls similar to the ones at issue here would be exploitative in a different context.

directed to all male students who had done so. In fact, Brentwood did not send the letter to one male student who had been accepted by Brentwood but had not yet signed an enrollment contract. Indeed, the students contacted had all agreed, and by all accounts were excited, to attend Brentwood the following year. Additionally, it is clear that the follow-up phone calls were made to clarify for the students involved that the practice was optional and should not preclude any other commitments they might have. The district court was right that "neither students nor parents were exploited in theory or in fact."

With regard to the former interest (keeping athletics subordinate to academics), it is a closer call, but the TSSAA's use of the regulation to punish Brentwood seems to "burden substantially more speech than is necessary to further the government's legitimate interest" in keeping athletics subordinate to academics. *See Ward*, 491 U.S. at 799; *see also United States v. O'Brien*, 391 U.S. 367, 377, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968) (holding that content-neutral regulations will be sustained only "if the incidental restriction on alleged *First Amendment* freedoms is no greater than is essential to the furtherance of that interest"). The TSSAA must demonstrate that in this situation "the recited harms [were] real, not merely conjectural, and that the regulation [would have] in fact alleviated these harms in a direct and material way." *Turner Broad. Sys.*, 512 U.S. at 664. They did not demonstrate this at trial. The district court obviously found the testimony of the parents of the boys in question to be more significant and persuasive than evidence from experts indicating that the letters and calls might — in theory — signal an emphasis on athletics over academics. The parents indicated they were glad to get the letter, and they did not at all think the implication of the letter was that Brentwood subordinated athletics to academics.

If the letters and calls were the first or only pieces of information the students or their families had ever received about Brentwood or would receive before arriving at the school, then an argument could be made that the school was unduly emphasizing athletics over academics. This was not the case. Each of the families of the children in question had already signed enrollment contracts with Brentwood. The information about spring football practice was simply information being provided to incoming students about an extracurricular activity available to them — an activity in which incoming students were allowed to participate under TSSAA rules.[12] Incoming students at Brentwood received a variety of information about a multitude of topics and activities, including academics at the school, and the letters and calls should be seen in this context.[13]

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[12] That the rule was subsequently changed to prevent such participation in spring practice bolsters the conclusion that the TSSAA's punishment of Brentwood in this case was not narrowly tailored. Banning spring practice participation, rather than applying the recruiting rule punitively to Brentwood's invitation to participate in the approved activity, would have been a more narrowly tailored way to promote the TSSAA's substantial interests. *See Thompson*, 535 U.S. at 373 ("Regulating speech must be a last — not first — resort. Yet here it seems to have been the first strategy the Government thought to try.").

[13] Headmaster Brown testified:

> As far as enrollment, we had to deal with our kids to get them acclimated to the school before they came. It would be — there's no way that they could start with no contact from the school before. I mean that's part of what all schools do. I mean they have got to get reading lists, got to know about the picnics, got to know about the options in the summer retreat, work options, and all of that so we have to communicate with them.

Admissions Director Brasher noted that admission is generally granted in November or February of the previous school year, and after a student is admitted and signs the enrollment contract, the student receives a packet of information, including a letter from the admission director, the student-parent agreement, and the handbook for Brentwood Academy with policies and procedures. Also, once an enrollment contract is signed,

Even if the students could (and sometimes did) "wiggle out" of their contracts with Brentwood, this did not mean that Brentwood should be punished for disseminating information about an optional activity for incoming Brentwood students. In fact, defendants' argument that the students in question were not technically enrolled and could have still decided to attend another school might even weigh in Brentwood's favor, in that the letters and calls could be seen as part of an ongoing attempt to make sure the incoming students were informed about what Brentwood had to offer. That these particular communications emphasized athletics does not mean that punishing Brentwood for the communications served the TSSAA's interest in keeping athletics subordinate to academics. In this context, the harm the TSSAA sought to prevent was "conjectural," not "real," or at least not based on the evidence in the record. *See id.* Put another way, it is not clear that the TSSAA's substantial interest in subordinating athletics to academics was achieved any more effectively by punishing Brentwood for Flatt's letters and calls than it would have been had no punishment been handed down. *Cf. Ward*, 491 U.S. at 798-801, 800 n.7 (holding that a sound-amplification guideline that eliminated the evils the city sought to eradicate without restricting a substantial

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that student's family is put on the school's general mailing list, and they receive all the information that is sent to current students. Brasher provided more details:

> We have a mailing that goes out usually about the end of May that will include reading list, letters from the English teachers, information about our summer session which includes summer school, computer camps, drama camps, athletic camp, driver's ed. We have arts in April, it's a big fine arts venue in April and we send them information on that.

Brasher also noted that there are some mailings that are targeted to particular groups of students, such as a letter about cheerleading tryouts that is sent only to girls.

quantity of speech represented "the essence of narrow tailoring," because it was not "substantially broader than necessary to achieve the interests justifying it"); *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 810, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984) (upholding a time/place/manner regulation because it "responded precisely to the substantive.

To justify its regulation on Brentwood's speech, the TSSAA cannot rely on "shoddy data or reasoning"; rather, its evidence must "fairly support [its] rationale" for the application of the recruiting rule to the letters and calls. *See City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 438, 122 S. Ct. 1728, 152 L. Ed. 2d 670 (2002). Carter himself seemed to doubt that one could actually measure whether such letters and calls would emphasize athletics over academics or exploit the children:

> Well, I think, first of all, you can't measure — you can't measure it on the effect that it had on those kids or any other circumstance that would occur. If [exploitation] occurs, then it's very difficult to imagine what impact it has on or to figure out what impact — I very seldom have seen kids in those situations that think it's had any impact on them. But it's very hard to turn around and determine that.

Carter's instinct was accurate, since despite evidence by numerous parents, school officials, and experts at trial, there was no evidence to show that the punishment of Brentwood was justified due to the effect of Brentwood's actions on the children or the relative standing of academics and athletics at the school. In sum, the TSSAA did not show that the application of the recruiting rule to Brentwood was narrowly tailored to serve the TSSAA's substantial

interests.[14] Reviewing *de novo*, we affirm the holding by the district court on this issue.[15]

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[14] This court's previous opinion supports this conclusion. In determining that the recruiting rule is content-neutral, rather than content-based, this court pointed out that the recruiting rule does not impose a "total ban...on communications between secondary schools and middle school athletes regarding high school athletics." *Brentwood Acad.*, 262 F.3d at 551-52. According to the court's opinion, the greatest restriction imposed by the rule is the "prohibition on coaches...from initiating contact with middle school students *for the purpose of recruiting student athletes.*" *Id.* at 552 (emphasis added). The rule allows "numerous ways in which Brentwood can get its message about athletics out to prospective students," as evidenced by the letter written by Brentwood's lawyer to the TSSAA in 1993 detailing Brentwood's understanding of various acceptable modes of communication. *Id.* On remand, the district court determined that applying the rule to the letters and calls was unconstitutional, since the application of the rule to the letters and calls was not narrowly tailored to further the TSSAA's substantial interests. Under the terms of this court's previous opinion, one could also read the district court opinion as a suggestion that the communications either were not made for the purpose of recruiting student athletes, or fell under the category of acceptable modes of communication under the recruiting rule, or both.

[15] The dissenting opinion's approach to this aspect of the case departs from a record-based analysis of whether the application of the recruiting rule to Brentwood was narrowly tailored to serve the TSSAA's substantial interests. In doing so, it neglects consideration of the evidentiary record, a process that an as-applied challenge necessarily entails, and substitutes theoretical analogies between recruiting rules and restrictions on adult-oriented businesses. While the dissent's approach might be appropriate in cases involving facial challenges to a regulation, such as *Renton* and *Ward*, on which the dissent heavily relies, it is inconsistent with the proper analysis for an as-applied challenge. *See Taxpayers for Vincent*, 466 U.S. at 796, 803 (distinguishing between a facial challenge and an as-applied challenge and concluding, after determining that the appellee could not establish that the law is "unconstitutional in every conceivable application, or...seeks to prohibit such a broad range of protected conduct that it is unconstitutionally 'overbroad,'" that the challenge was "basically a challenge to the ordinance as applied to [the appellee's] activities," and therefore "limited [the Court's] analysis of the constitutionality of the ordinance to the concrete case before [it]"); *cf. Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973) (noting that litigants bring a facial challenge where they attack "a statute not because their own rights of

C. Free Tickets as a Substantive Due Process Violation

The district court also held that the application of the recruiting rule to Brentwood violated the school's substantive due process rights with regard to the free tickets used by two students to attend a Brentwood football game. After citing authority indicating that the doctrine of substantive due process means that "governmental deprivations of life, liberty or property are subject to limitations regardless of the adequacy of the procedures employed," *see Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1216 (6th Cir. 1992) (internal quotation marks and citation omitted), the district court centered its substantive due process analysis on the notion that

> as applied, the Recruiting Rule did not give Brentwood Academy constitutionally adequate notice that providing tickets to another coach, who secretly disregards express instructions to use the tickets only for adults, will constitute a violation.

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free expression are violated, but because...the statute's very existence may cause others not before the court to refrain from constitutionally protected speech").

The dissenting opinion's only arguable reference to the trial court record on the issue of whether application of the rule to Brentwood was narrowly tailored to serve the TSSAA's substantial interests is its suggestion that the rule permitted Brentwood to distribute its letters to private athletic leagues and other schools and permitted Brentwood coaching staff to refer potential students who contacted them to other Brentwood officials. The dissent deems these options alternative channels for communication. While these options are presumably permissible (but not mentioned in the evidence), they are hardly viable alternatives for achieving Brentwood's purpose and communicating the information contained in the letters to incoming students. The dissent's noting of these options is another way of saying that the recruiting rule did not prohibit Brentwood from advertising its sports and other offerings to the world at large through any available public medium, but that fact has little if anything to do with whether the recruiting rule as applied to Brentwood was narrowly tailored to serve the TSSAA's substantial interests.

> The Recruiting Rule is unconstitutionally vague as applied to Brentwood Academy on the facts of this case.

The court went on to explain that "the Recruiting Rule did not give...Brentwood Academy a reasonable opportunity to know what was prohibited with regard to complimentary tickets so that it could act accordingly."

When the vagueness argument was formulated as a *First Amendment* challenge, this court repudiated it. *See Brentwood Acad.*, 262 F.3d at 557 ("As a whole, the [recruiting] rule gives reasonable notice of what is prohibited, especially as applied to Brentwood."). Essentially, the district court has now recast its previous holding striking down the recruiting rule as overbroad and vague (a holding that was reversed) as a determination that Brentwood's substantive due process rights were violated. *See Brentwood Acad.*, 13 F. Supp. 2d at 693. Yet, if the substantive due process claim is characterized as a vagueness challenge,[16] then for the reasons set out in this court's previous opinion, the claim fails. *See Brentwood Acad.*, 262 F.3d at 555-57; *see also Grayned v. City of Rockford*, 408 U.S. 104, 112, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972) (upholding an anti-noise ordinance against a vagueness challenge because it clearly "delineates its reach in words of common understanding") (internal quotation

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[16] Brentwood's initial complaint lumps together a number of justifications for its claim that TSSAA violated its substantive due process rights. For instance, Brentwood claims that the recruiting rule infringed on liberty interests of students and parents to choose their schools, the recruiting rule is too vague, and the rule is fundamentally unfair in that Brentwood was punished for actions of a person beyond its control. The third argument is better analyzed as a procedural due process claim and is considered *infra*. *Cf. County of Sacramento v. Lewis*, 523 U.S. 833, 840, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998) (holding that substantive due process precludes certain government actions "regardless of the fairness of the procedures used to implement them") (citation omitted).

marks and citation omitted). If the substantive due process claim instead rests on an argument that the TSSAA's application of the recruiting rule infringed some fundamental constitutional right, the claim fails because no such right is implicated here,[17] and the TSSAA's action was thus subject only to rational basis scrutiny. *See Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488, 75 S. Ct. 461, 99 L. Ed. 563 (1955). Lastly, if the substantive due process claim rests, as the district court seems to intimate at one point, on an allegation that the TSSAA acted arbitrarily or capriciously to deprive Brentwood of a property or liberty interest, it still fails, at least as a *substantive* due process claim. Brentwood could not reasonably allege that the defendants perpetrated an "egregious abuse of governmental power" sufficient to give rise to a substantive due process claim, because there is no evidence to suggest that the defendants "maliciously and intentionally abused [their] state authority in order to injure" Brentwood. *See Vinson v. Campbell County Fiscal Court*, 820 F.2d 194, 201 (6th Cir. 1987). Indeed, such a claim of a deprivation of a property or liberty interest, at least outside of the zoning context, *see Pearson*, 961 F.2d at 1217, is more appropriately characterized as a procedural due process claim, which is considered *infra*. For all of these reasons, the district court erred in concluding that the application of the recruiting rule to penalize Brentwood for the free game tickets episode violated Brentwood's substantive due process rights. We reverse the district court on this issue.

D. Procedural Due Process Claim

The district court also found that Brentwood's procedural due process rights were violated. The *Fourteenth Amendment* provides, in part, that "no State

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[17] The fundamental right to educate one's own children, *see Pierce v. Soc'y of Sisters*, 268 U.S. 510, 53435, 45 S. Ct. 571, 69 L. Ed. 1070 (1925), is not at issue, especially since the regulation and penalties were applied only against Brentwood, not against the parents of the children involved.

shall . . . deprive any person of life, liberty, or property, without due process of law." *U.S. Const. amend. XIV*, § 1. Procedural due process generally requires that the state provide a person with notice and an opportunity to be heard before depriving that person of a property or liberty interest. *See, e.g., Thompson v. Ashe*, 250 F.3d 399, 407 (6th Cir. 2001) ("Courts have long recognized that the *Fourteenth Amendment* requires that an individual who is deprived of an interest in liberty or property be given notice and a hearing."). Only after a plaintiff has met the burden of demonstrating that he possessed a protected property or liberty interest and was deprived of that interest will the court consider whether the process provided the plaintiff in conjunction with the deprivation, or lack thereof, violated his rights to due process. *Hamilton v. Myers*, 281 F.3d 520, 529 (6th Cir. 2002).

The first issue is whether Brentwood was deprived of a property interest. Clearly, at a minimum, fining Brentwood $3,000 deprived Brentwood of a property interest. *See Herrada v. City of Detroit*, 275 F.3d 553, 556 (6th Cir. 2001). The panel need not decide whether potential lost revenues due to the ban from playoff participation also qualify as a property interest.

The second step in the procedural due process analysis is determining whether the TSSAA's deprivation of Brentwood's property interest contravened notions of due process. Under circuit precedent, a *§ 1983* plaintiff can prevail on a procedural due process claim by demonstrating that the property deprivation resulted from either: (1) an "established state procedure that itself violates due process rights," or (2) a "random and unauthorized act" causing a loss for which available state remedies would not adequately compensate the plaintiff. *Macene v. MJW, Inc.*, 951 F.2d 700, 706 (6th Cir. 1991). A plaintiff alleging the first element of this test would not need to demonstrate the inadequacy of state remedies. *Moore v. Bd. of Educ. of Johnson City Sch.*,

134 F.3d 781, 785 (6th Cir. 1998). If the plaintiff pursues the second line of argument, he must navigate the rule of *Parratt v. Taylor*, 451 U.S. 527, 539, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981), which holds that a state may satisfy procedural due process with only an adequate post-deprivation procedure when the state action was "random and unauthorized." *See Macene*, 951 F.2d at 706. In *Zinermon v. Burch*, 494 U.S. 113, 12829, 110 S. Ct. 975, 108 L. Ed. 2d 100 (1990), the Supreme Court narrowed the *Parratt* rule to apply only to those situations where pre-deprivation process would have been impossible or impractical. In this context, an "unauthorized" state action means that the official in question did not have the power or authority to effect the deprivation, not that the act was contrary to law. *See id.* at 138.

Whether seen as an attack on an established state procedure or as an attack on a "random and unauthorized" act, Brentwood's claim is not subject to the *Parratt* rule, as it clearly was not "impossible" for the TSSAA to grant a pre-deprivation hearing[18] to Brentwood on these facts. *See id.* at 128. It seems clear that Carter and the Board had the

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[18] The district court stated that Brentwood was deprived of its property interests immediately upon issuance of the July 29, 1997, letter, simply because the letter itself said the penalties were effective immediately. *See Brentwood Acad.*, 304 F. Supp. 2d at 1005. The hearings held after this date, the court reasoned, were therefore post-deprivation hearings, which under certain Supreme Court precedent, must be more extensive and thorough than pre-deprivation hearings. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985). This conclusion by the district court seems wrong, as Brentwood did not pay the $3,000 fine, and it appealed the July 29, 1997, decision precisely so it would not have to pay the fine or be subject to any other penalty. Brentwood had thus not been "deprived" of its property by August 23, when the final hearing was held. *Cf. id.* at 545-46 (drawing the deprivation line at the moment of termination of employment). In any event, it is immaterial to the analysis in this case whether the hearing process occurred pre-deprivation or post-deprivation.

authority to impose the penalties against Brentwood; their acts were not "random and unauthorized." If, as is more likely, the TSSAA's action was the result of an "established state procedure," then the question becomes whether that procedure violated Brentwood's due process rights.[19]

Brentwood first argues that it was deprived of the right to a "neutral, impartial decision-maker." Brentwood points out that Carter acted as investigator, trial judge, initial appellate judge, and participant in the final appeal. This court, however, has rejected arguments that due process is violated when the same official plays multiple roles in the process, such as when he acts as investigator, witness, presiding officer at hearing, and final decision-maker. *See Moore*, 134 F.3d at 786; *Duchesne v. Williams*, 849 F.2d 1004, 1005 (6th Cir. 1988) (en banc); *Newsome v. Batavia Local Sch. Dist.*, 842 F.2d 920, 926-27 (6th Cir. 1988). This line of argument thus fails.

In finding a violation of Brentwood's procedural due process rights, the district court focused on Brentwood's alternative procedural due process argument: that during the TSSAA Board of Control's private deliberations after the August 23, 1997, hearing, the Board heard *ex parte* evidence regarding contacts with middle school students allegedly made on behalf of Brentwood, and that this evidence affected the Board's final decision and penalty. Brentwood claims that it should have had the chance to rebut this evidence by cross-examining the TSSAA investigators who discussed these contacts with the Board during the private deliberations. *See Goldberg v. Kelly*, 397 U.S. 254, 269, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970) ("In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to

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[19] Even if the acts were "random and unauthorized," and the *Parratt* rule did apply, the ultimate issue would be this same question: whether the procedure provided (the hearings in front of the Board of Control) was adequate. *See Macene*, 951 F.2d at 706.

confront and cross-examine adverse witnesses."); *see also Loudermill*, 470 U.S. at 546 ("The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement.").

In evaluating Brentwood's argument, it is necessary to recount in some detail the evidence about the subject of the *ex parte* discussion. There had been reports made to the TSSAA alleging that an Amateur Athletic Union (AAU) basketball coach named Bart King urged particular middle school student athletes to attend Brentwood, had provided transportation to Brentwood for those students, and promised scholarships to those students. Brentwood alleged in its initial complaint that King was in no way affiliated with the school and that Brentwood never represented to King or others that King had authority to act on its behalf. After the TSSAA received reports containing the allegations involving King, two TSSAA officials, Gene Meness and Bernard Childress, investigated the matter. Meness and Childress met with Brentwood Headmaster Brown in early June 1997 and asked Brown about King. Brown suggested that they put questions regarding King and other issues in writing and send them to him. Through an exchange of letters during July 1997, the TSSAA informed Brentwood that it was investigating the allegations relating to King, and Brentwood stressed to the TSSAA that King was in no way associated with Brentwood Academy. Meness and Childress did not speak to King during the investigation.

As the district court found, there was no indication from the TSSAA before the final hearing that it was still considering the Bart King allegation.[20] In fact, the district

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[20] Carter's July 29, 1997, letter to Brown details six "concerns" and violations on which the penalties are based. Only the sixth concern, which obliquely refers to contacts "by persons not connected with Brentwood Academy," arguably has anything to do with King. The violation listed

court determined that "the TSSAA and Carter misled Brentwood Academy about a person and allegation which ultimately mattered to the decision." *See Brentwood Acad.*, 304 F. Supp. 2d at 1004 n.29. Despite this lack of indication that King's conduct was at issue, at the final hearing on August 23, Brentwood's counsel Tom Nebel offered to call King as a witness, saying, "We have Bart King here to answer any questions. And it was our intention to put him on, but I don't know if you all are interested in extending for five minutes to hear Bart King or not. He's here if you want him." Carter answered, "No." Evidently this was the only discussion of King at the hearing. Carter later testified that "if Brentwood Academy wanted [to call King], they could have easily done it....The school can put on anything they want to." Nebel later testified that he was not cut off from presenting any information he wanted to present at the hearing.

Meness and Childress were present during the Board of Control's private deliberations following the August 23 hearing. While Childress recalled answering some questions posed by Board members, neither Meness nor Carter recalled answering any questions about Bart King. Board of Control President Mike Reed and Board member Michael Hammond testified that during the Board's private session, the Board discussed the allegations surrounding King's actions. In Reed's initial deposition in this case, Reed was asked whether the King allegations were one of the reasons behind the Board's ultimate finding (upon which the penalties were based, in part) that there was "contact with

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under concern six, however, gives no indication that the TSSAA seeks to assign any responsibility to Brentwood for any actions by King. At the first hearing on August 13, 1997, Brentwood submitted an affidavit from King denying the allegations detailed in the earlier exchange of correspondence between the TSSAA and Brentwood. Then, after the first hearing, Carter sent Brown a letter dated August 14, 1997, listing the violations found at the first hearing. None of these violations implicates King in any way.

student-athletes, initiated by Brentwood Academy, while those students were enrolled at other schools." Reed answered affirmatively. However, at trial, Reed first testified that although the King allegations were a "factor" in the discussion of the final penalty, the "final penalty did not involve Bart King": "We discussed Bart King and the situation that took place, we did, we discussed it, but the final penalty really dealt with the letter from Mr. Flatt." When asked about his deposition testimony at trial, Reed also referred to a lack of memory in his deposition testimony and further indicated that the situation with King "was a factor in the overall penalty." The assertion that the final penalty was not based on the King allegations was reiterated by Carter and Hammond in their testimony at trial.

The district court found that the TSSAA and Carter violated Brentwood's procedural due process rights by considering *ex parte* evidence during their private deliberations on August 23, 1997. In reaching this conclusion, the district court recounted the testimony of Board of Control President Reed as well as Board members Hammond, Mickey Dunn, and Morris Rogers, all of whom indicated in their testimony that TSSAA investigators Childress and Menees provided some information to the Board regarding their findings during the private session. Additionally, the court noted that Carter testified that Carter, Meness, and Childress were all present to answer questions from the Board during the private session. The court below also pointed out that "Bart King, according to Reed, was discussed and...was a factor in the penalties imposed." *Id.* at 1004. The court credited all of this evidence "based on the demeanor of the witnesses, the consistency of the testimony, and because the testimony is adverse to the witnesses' interests as TSSAA Board of Control members." *Id.* The district court's factual finding that there was discussion during the Board of Control's

deliberations about the King allegations was not clearly erroneous and, in fact, was well-supported by the evidence. The district court was also correct in its conclusion that Brentwood Academy did not have notice that the King matter was a possible basis for final TSSAA action against Brentwood. Whether the King issue was actually a factor in the penalties ultimately imposed is far less certain. Yet the district court was entitled to credit Reed's deposition and trial testimony that the King issue influenced the Board's findings and penalties over his contrary trial testimony and other evidence that the King issue was not a basis for the penalties.[21] *See Fed. R. Civ. P.* 52(a) ("Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."). Thus, the finding that the King issue influenced the penalties is also not clearly erroneous.

There is no applicable precedent that describes the precise process a school such as Brentwood should receive from a state athletic association such as the TSSAA before the association imposes penalties such as the ones assessed here. *Cf. Loudermill*, 470 U.S. at 545-46 (setting out the due process requirements for termination of tenured public employees); *Goss v. Lopez*, 419 U.S. 565, 581, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975) (setting out the due process requirements for short-term school suspensions); *Morrissey v. Brewer*, 408 U.S. 471, 488-89, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972) (setting out the due process requirements for parole revocations). The district court therefore correctly looked to the general balancing test of *Mathews v. Eldridge*, 424 U.S. 319, 334-35, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) to

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[21] Reed's deposition testimony is a prior inconsistent statement given under oath and also amounts to an admission against interest on the part of the TSSAA. *Fed. R. Evid.* 801(d)(1) & (2).

determine what process is due in this situation. The *Mathews* balancing test states:

> Identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

The district court correctly concluded that in a situation such as the one presented by this case, due process requires that a school be informed of all of the issues relied on by an athletic association levying penalties against the school and be given a chance to respond to those issues before the penalties are imposed.[22] Such a requirement imposes only a minimal burden on the state actor and would be of great value in ensuring that a school is not wrongfully penalized. Moreover, as the district court noted, such a requirement is clearly consistent with the notification requirements set out by this court and others in analogous situations. *See, e.g., Loudermill*, 470 U.S. at 546 ("The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story."); *Moore*, 134 F.3d at 786 ("The process offered Moore was constitutionally sufficient. She received written notice of the charges against her, as well as an explanation of the Board [of Education]'s evidence, and was offered an opportunity to present her side of the story."); *Swank v.*

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[22] OMITTED FROM TEXT.

Smart, 898 F.2d 1247, 1253 (7th Cir. 1990) ("[The police officer] was entitled to challenge the chief's assessment of the damage caused by the [incident in which the officer was seen giving a girl a ride on his motorcycle]. *Ex parte* presentation of evidence denies due process...."); *id.* at 1256 ("A tenured public employee has a constitutional entitlement to a fair hearing before being fired and that with immaterial exceptions a fair hearing includes the right to be shown the evidence on which the tribunal has relied, including evidence pertaining to the gravity of the sanction to be imposed when liability is conceded.") (citations omitted); *Newsome*, 842 F.2d at 927 (holding that student was "denied procedural due process when the superintendent disclosed to the school board, during their closed deliberations, new evidence which had not been presented during the open hearing at which Newsome and his attorney were present"); *see also Greene v. McElroy*, 360 U.S. 474, 496, 79 S. Ct. 1400, 3 L. Ed. 2d 1377 (1959) ("Where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.").

In sum, we affirm the district court's conclusion that the TSSAA and Carter violated Brentwood's procedural due process rights. The district court correctly determined what process was due to Brentwood: notice of the evidence relied upon in penalizing Brentwood and an opportunity to respond to that evidence before penalties were imposed. Here, the TSSAA failed to give that notice as it related to King. Brentwood therefore had no notice that it should respond to the King evidence at the hearings. Yet, the King evidence was used by the TSSAA in its deliberations and, under the district court's findings, influenced the penalties imposed on Brentwood. The failure to afford the requisite

process violated Brentwood's *Fourteenth Amendment* rights to procedural due process.

E. Availability of Qualified Immunity for Carter

The district court also held that Carter was not entitled to qualified immunity. Whether a defendant is entitled to qualified immunity is a question of law reviewed *de novo*. *Thacker v. City of Columbus*, 328 F.3d 244, 259 (6th Cir. 2003). Qualified immunity protects government officials from civil liability for actions taken within their official discretion insofar as these actions do not violate clearly established statutory or constitutional rights of which a reasonable official would have been aware. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). It is not merely a defense to liability; rather, when applicable, qualified immunity protects government officials from lawsuits and, hence, the burdens of litigation. *See Saucier v. Katz*, 533 U.S. 194, 200-01, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001).

The initial question here is whether the qualified immunity defense is even available to Carter, an employee of a non-profit corporation that has been found to be a state actor when engaging in regulatory activity. "In assessing whether the qualified immunity afforded state officials extends to private actors who are considered state actors under *§ 1983*, [the court] must consider both the purposes of qualified immunity protection and the nature of the relationship between the state and the putative private party." *Bartell v. Lohiser*, 215 F.3d 550, 556 (6th Cir. 2000). This court held in *Bartell* that workers for a non-profit foster-care corporation that had contracted with the government and was closely supervised by a state agency were entitled to qualified immunity. *Id.* at 557. The *Bartell* court distinguished *Richardson v. McKnight*, 521 U.S. 399, 412, 117 S. Ct. 2100, 138 L. Ed. 2d 540 (1997), in which the Supreme Court held that private prison guards were not entitled to qualified immunity, as involving a for-profit

corporation that operated with limited direct supervision by the government. *See Bartell*, 215 F.3d at 556-57 (citing *Richardson*, 521 U.S. at 413). Here, one of these factors weighs in favor of Carter (because the TSSAA is a nonprofit corporation) and one weighs in favor of Brentwood (because the TSSAA operates with limited direct governmental supervision).

Nevertheless, a closer examination of *Bartell* and *Richardson* indicates that the balance is tipped towards Carter's argument that qualified immunity is available to him. Specifically, one of the key reasons qualified immunity was unavailable in *Richardson* was because the purposes of qualified immunity were already served by "marketplace pressures" that themselves "provided the private firm with strong incentives to avoid overly timid, insufficiently vigorous, unduly fearful, or 'non-arduous' employee job performance." 521 U.S. at 410. Here, there are no such marketplace pressures; the TSSAA, unlike the prison firm in *Richardson*, does not have to compete with other firms for the job it does on behalf of the state. Also, the *Richardson* court relied heavily on the fact that "history does not reveal a 'firmly rooted' tradition of immunity applicable to privately employed prison guards." *Id.* at 404 (citing *Wyatt v. Cole*, 504 U.S. 158, 164, 112 S. Ct. 1827, 118 L. Ed. 2d 504 (1992)). The district court in this case picked up on this rationale, noting that "judicial history does not reveal a firmly rooted tradition of immunity applicable to employees of private athletic associations." The notion that there would be such a "firmly rooted" history, though, is unreasonable in the first place, considering that athletic associations like the TSSAA have only recently grown in importance and stature, and litigation involving such associations has been relatively rare. *See Brentwood Acad.*, 531 U.S. at 304 ("No one...has pointed to any explosion of *§ 1983* cases against interscholastic athletic associations...."); *see also Richardson*, 521 U.S. at 414-15 (Scalia, J.,

dissenting) (chiding the *Richardson* majority for relying on the historical absence of any cases in which immunity was successfully asserted by a private prison guard). We find that qualified immunity is available to officials such as Carter.

Having found that qualified immunity is available to Carter, the next question is whether it applies in this case. If an official acts within his discretionary authority and asserts qualified immunity, the burden shifts to the plaintiff to prove that the officer violated a right so clearly established that any reasonable official in his position would have understood it was unlawful to engage in the conduct that violated the right. *See Gardenhire v. Schubert*, 205 F.3d 303, 311 (6th Cir. 2000). This court evaluates this burden according to a three-prong standard. *See Williams v. Mehra*, 186 F.3d 685, 691 (6th Cir. 1999). First, the court considers whether a constitutional or statutory violation occurred. *Id.* If so, the court then considers whether the right that was violated was clearly established in the sense that a reasonable person would have known of the right. *Id.* The right must have been "clearly established at the time of the actions in question." *Dickerson v. McClellan*, 101 F.3d 1151, 1158 (6th Cir. 1996). If the right was clearly established, the court's third step is to "determine whether the plaintiff has alleged sufficient facts, and supported the allegations by sufficient evidence, to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights." *Williams*, 186 F.3d at 691.

Having found that a violation of Brentwood's procedural due process rights occurred, the next question is whether Brentwood's rights were clearly established such that "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202. On this point, there is simply no support for the district court's conclusion that "the contours of procedural

due process were sufficiently clear and apparent that Carter had fair warning, and reasonably should have understood, that what he did violated the procedural due process rights of Brentwood Academy." As described above, there is no applicable authority describing what process state secondary athletic associations must provide when enforcing their regulations. It asks too much of Carter to expect him to have applied the *Mathews* factors and concluded that failing to give notice that the King issue would be considered and then considering it during the Board's private deliberations would violate Brentwood's due process rights. Regardless of Carter's extensive involvement in the investigation and decision making with regard to the TSSAA's penalties against Brentwood, there is no evidence that his conduct was objectively unreasonable, or that Brentwood's due process rights (or *First Amendment* rights, for that matter) in this context were clearly established. For these reasons, we reverse the district court on this issue and find that Carter is entitled to qualified immunity.

F. Antitrust Immunity

The district court ruled in an October 2002 order that the TSSAA was entitled to antitrust immunity under the doctrine of *Parker v. Brown*, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943). Brentwood appeals from this order, arguing that the doctrine does not apply and that its antitrust claim should be permitted to proceed.[23]

In addition to the facts noted earlier about the TSSAA as an organization, the following facts are pertinent to the antitrust immunity inquiry. The bulk of the TSSAA's revenues come from gate receipts at member teams'

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[23] In its brief the TSSAA argues a number of issues relating to the antitrust claim. Before the district court, however, it raised only the antitrust immunity issue, and we will therefore not consider the other issues on appeal. *See Barner v. Pilkington N. Am., Inc.*, 399 F.3d 745, 749 (6th Cir. 2005).

tournaments, but member schools do pay annual dues. TSSAA employees are not paid by the state but are eligible to join the state employee retirement system. The voting membership of the Board of Control and Legislative Council (the rulemaking body of the TSSAA) are composed of school administrators, and the public school administrators who typically serve in these positions carry out their TSSAA duties during regular school hours.

The district court issued only a cursory explanation of its decision on this issue. The court explained, without analysis, that the Supreme Court's decision on "pervasive entwinement" meant that the TSSAA was a state actor "for purposes of antitrust immunity." However, while there are similarities between the two tests, the *Parker* antitrust immunity inquiry is different from the inquiry into whether state action exists for the purposes of *§ 1983* and the *Fourteenth Amendment. See Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 194 n.14, 109 S. Ct. 454, 102 L. Ed. 2d 469 (1988) (noting that the two inquiries are "somewhat similar" but "by no means identical"); *Tarabishi v. McAlester Reg'l Hosp.*, 951 F.2d 1558, 1565 n.6 (10th Cir. 1991). Indeed, the extensive case law on the issue of *Parker* antitrust immunity reveals that the doctrine does not apply to the TSSAA.

In *Parker*, the Supreme Court held that when a "state in adopting and enforcing [a regulatory] program..., as sovereign, imposed the restraint as an act of government," the program could not violate the Sherman Act, because the Act was directed against "individual and not state action." 317 U.S. at 352; *see also City of N. Olmsted v. Greater Cleveland Reg'l Transit Auth.*, 722 F.2d 1284, 1287 (6th Cir. 1983) ("[The] doctrine enunciated in *Parker* ...exempt[s] 'anticompetitive conduct engaged in as an act of government by the state as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service' from Sherman Act control.")

(quoting *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 413, 98 S. Ct. 1123, 55 L. Ed. 2d 364 (1978) (opinion of Brennan, J.)) (emphasis removed). The Court has clarified that while *Parker* immunity clearly applies to a state legislature or a state supreme court acting in its legislative capacity, when the regulatory activity is carried out by others pursuant to state authorization, the program must meet the two-part standard set out in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980). *See Hoover v. Ronwin*, 466 U.S. 558, 567-68, 104 S. Ct. 1989, 80 L. Ed. 2d 590 (1984). "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." *Midcal Aluminum*, 445 U.S. at 105 (quoting *City of Lafayette*, 435 U.S. at 410 (opinion of Brennan, J.)).[24] Like other judicially imposed exemptions from the antitrust laws, the *Parker* doctrine must be narrowly construed. *See FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636, 112 S. Ct. 2169, 119 L. Ed. 2d 410 (1992).

The first question under the *Midcal Aluminum* test is whether the TSSAA acts pursuant to a "clearly articulated and affirmatively expressed" state policy to displace competition. 445 U.S. at 105. This policy must be one clearly articulated in the first instance not by a state agency, *see Goldfarb v. Va. State Bar*, 421 U.S. 773, 790, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975), but by "the State itself, such as a policy approved by a state legislature...or a State Supreme Court," *see S. Motor Carriers Rate Conference, Inc. v.*

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[24] In *Midcal Aluminum*, the Court held that a California price-setting system for wine met the first but not the second prong of the test, because the state simply authorized the price setting and enforced the prices established by private parties. 445 U.S. at 105. The State did not monitor market conditions or otherwise actively supervise the program. *Id.* at 105-06. Therefore, California's involvement was not sufficient to establish *Parker* immunity. *Id.*

United States, 471 U.S. 48, 63, 105 S. Ct. 1721, 85 L. Ed. 2d 36 (1985) (citations omitted). The "clearly articulated" state policy requirement is not satisfied "when the State's position is one of mere neutrality respecting the municipal actions challenged as anticompetitive." *Cmty. Communications Co. v. City of Boulder*, 455 U.S. 40, 55, 102 S. Ct. 835, 70 L. Ed. 2d 810 (1982). In *City of Boulder*, the Court held that the *Parker* doctrine did not protect a municipality's regulation of the cable television market, even if the city's activities were authorized by a home rule statute, because the "general grant of power to enact ordinances" did not imply "state authorization to enact specific anticompetitive ordinances." *Id.* at 56. On the basis of this rationale, the TSSAA should not receive antitrust immunity. The Tennessee General Assembly has done nothing more than delegate to the State Board of Education the general authority to develop policies for the operation of public schools. *Tenn. Code Ann.* § 49-1-302. The state statute says nothing about interscholastic athletics or the TSSAA itself, which acts under the auspices of the Board. *See Brentwood Acad.*, 531 U.S. at 292-93. The Tennessee statue represents a vague, neutral authorization by the sovereign; this is not enough to establish a "clearly articulated and affirmatively expressed" state anticompetitive policy. *Midcal Aluminum*, 445 U.S. at 105; *see also Mich. Paytel Joint Venture v. City of Detroit*, 287 F.3d 527, 534 (6th Cir. 2002) ("Grants of general or neutral authority to govern local affairs will not satisfy the 'clear articulation' component of the state action exemption from antitrust liability.").

Other Supreme Court precedent, however, suggests that "'explicit authorization' by state legislatures to displace competition [is] not necessary to pass the clear articulation test. The *Parker* exemption applies as long as the suppression of competition is the foreseeable or logical result of what the state authorizes." *Id.* at 535 (citing *Town*

of Hallie v. City of Eau Claire, 471 U.S. 34, 4244, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985)). In *Town of Hallie*, a city refused to supply sewage treatment facilities to those outside the city's borders. 471 U.S. at 37. The state statute did not refer to competition, but it authorized the city to refuse to provide sewage treatment to adjacent unincorporated areas unless they agreed to annexation. *Id.* at 41. The Court held that "anticompetitive effects logically would result from this broad authority to regulate" and thus the first prong of the *Midcal Aluminum* test was met. *Id.* at 42. *Town of Hallie* is distinguishable, however, since although the state statute in that case did not explicitly authorize anticompetitive state behavior, it specifically described and authorized the policy in question. Here, not only does the Tennessee statute fail to authorize anything like the recruiting rule or any other regulation, but it also fails to mention interscholastic athletics at all. The state as sovereign has not made clear its intent to establish an anticompetitive regulatory program. *Cf. S. Motor Carriers Rate Conference*, 471 U.S. at 63-64 ("The legislature thus made clear its intent that intrastate rates would be determined by a regulatory agency, rather than by the market."); *Mich. Paytel*, 287 F.3d at 536 (holding that anticompetitive effects are "the logical and foreseeable result of the City's broad authority under state law and the Michigan Constitution to bid out public contracts for the maintenance of City prisons").

Assuming, *arguendo*, that the TSSAA acts pursuant to a "clearly articulated and affirmatively expressed" anticompetitive state policy, the next question is whether its regulatory program is actively supervised by the state. *See Midcal Aluminum*, 445 U.S. at 105.[25] This court has held

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[25] A threshold question before reaching this second prong of the test is whether the second prong applies to the TSSAA. *Town of Hallie* stands for the proposition that the active state supervision requirement is not applicable in cases where the actor is a municipality, and the Court

that the active supervision requirement must be met by state supervision; "municipal oversight" of the program is insufficient. *See Riverview Invs., Inc. v. Ottawa Cmty. Improvement Corp.*, 774 F.2d 162, 163 (6th Cir. 1985). Significantly, this court has also held that antitrust immunity does not apply to a private actor to whom authority is delegated such that the private actor becomes the "effective decision maker." *See Mich. Paytel*, 287 F.3d at 537-38. In these situations, when a private actor (such as a non-profit corporation) acts on behalf of the state but makes "'independent decisions without the input, advice, involvement, or oversight of...any...governmental body,'" antitrust immunity does not apply. *Id.* at 538 (quoting *Riverview Invs., Inc. v. Ottawa Cmty. Improvement Corp.*, 899 F.2d 474, 481-82 (6th Cir. 1990)); *see also Town of Hallie*, 471 U.S. at 47 ("Where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State."). Here, authority was clearly delegated from the state to the State Board of Education and then, in turn, to the TSSAA. There is nothing at all in the record to indicate that the state is actively involved in supervising the TSSAA. In fact, the evidence suggests that the opposite is the case. *See also Midcal Aluminum*, 445 U.S. at 106 ("The national policy in favor of competition cannot be thwarted by casting such a

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suggested in dicta in that case that the same should go for cases in which the actor is a "state agency." *See 471 U.S. at 46*, 46 n.10. In their brief, defendants cite a number of cases to support their argument that the TSSAA qualifies as a political subdivision of the state for antitrust purposes and therefore need not meet the second prong of the *Midcal Aluminum* test. However, none of these cases concern an athletic association such as the TSSAA, and defendants cite no case from this circuit to support their argument. In fact, circuit precedent suggests that it is only municipalities that are exempt from the second prong of the test. *See Mich. Paytel*, 287 F.3d at 536 (holding that "private parties must establish both" elements of the *Midcal Aluminum* test).

gauzy cloak of state involvement over what is essentially a private price-fixing arrangement.").[26]

Defendants therefore cannot establish either prong of the *Midcal Aluminum* test. For these reasons, we reverse the district court's October 2002 decision finding that the TSSAA is entitled to *Parker* antitrust immunity and remand for further proceedings with respect to Brentwood's antitrust claim.

G. Relief Issues

Brentwood also appeals the district court's denial of damages. "When *§ 1983* plaintiffs seek damages for violations of constitutional rights, the level of damages is ordinarily determined according to principles derived from the common law of torts." *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 306, 106 S. Ct. 2537, 91 L. Ed. 2d 249 (1986). "Proximate causation is an essential element of a § 1983 claim for damages. That is, a violation of a federally secured right is remediable in damages only upon proof that the violation proximately caused injury." *Horn v. Madison County Fiscal Court*, 22 F.3d 653, 659 (6th Cir. 1994) (internal citation omitted). The district court found that the

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[26] The dissent rests its differing result on our decision in *Consolidated Television Cable Service, Inc. v. City of Frankfort*, 857 F.2d 354 (6th Cir. 1988). Based on the ruling in that case, it concludes that the TSSAA is the agent of the Tennessee Board of Education, itself a state agency, and that the TSSAA need only meet the state antitrust immunity test for state political subdivisions. The relationship between the municipality and its agent cable television company in *Consolidated*, however, is not analogous to the relationship between the Board and the TSSAA. Frankfort provided cable television service to its citizens and owned the system for providing the service, created the cable company to operate the system, and exercised continued supervisory control over the cable company — described by the court as "ultimate control." *Id.* at 358. In fact, *Consolidated* itself had previously described the cable company as an agent of the municipality, a fact which the court mentioned as *dicta* but which nevertheless appears important to the resolution. The TSSAA, with its mix of public and private membership and revenue, its elaborate internal governance and appeal structure, and its lack of state supervision does not fit within the cable company model described in *Consolidated*.

damages claimed by Brentwood (reputational harms and time spent by employees on the case) were not proximately caused by the defendants. On appeal, Brentwood argues that the district court should have considered whether the damages were "foreseeable" and that the harms suffered by Brentwood were foreseeable consequences of the defendants' conduct.

The district court rightly pointed out that any costs incurred by Brentwood as a result of the litigation were costs it chose to incur when it filed the case. As to Brentwood's reputational damage, foreseeability is an element of the proximate cause analysis, but it is distinct from the requirement that a plaintiff show the injury was directly caused by the defendant. *See Perry v. Am. Tobacco Co.*, 324 F.3d 845, 850-51 (6th Cir. 2003). It is a fundamental tort law principle that while an injury to a plaintiff might be foreseeable, the damages incurred could still be "too remote to permit recovery." *See, e.g., Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229, 236 (2d Cir. 1999). Here, the district court sensibly concluded that even if Brentwood's reputational harms were foreseeable, they could be traced much more directly to the media and other third-party actors than to the TSSAA or Carter.

Brentwood also argues that the district court, which enjoined the penalties assessed against Brentwood, should have also enjoined the enforcement of the recruiting rule "as applied to speech more generally." Brentwood asserts in its brief that "only a decision-forcing injunction against applying the [recruiting rule] to speech can assure TSSAA's *First-Amendment*-mandated 'careful calculation of the speech interests involved.'" These arguments are not well-taken. In its previous opinion, this court clearly rejected a facial challenge to the recruiting rule based on an argument that the regulation was invalid in all of its applications. *Brentwood Acad.*, 262 F.3d at 554-57. The court suggested that the recruiting rule could in fact be applied

constitutionally in some cases, and the district court's task on remand was to consider only whether the rule was constitutional as applied to Brentwood. *Id.* at 554-58. The district court correctly limited its remedy accordingly and enjoined only the application of the rule to Brentwood in this case.[27] We affirm the remedy granted by the district court.

III.

For the foregoing reasons, we: (1) affirm those parts of the district court's decision finding for Brentwood on its *First Amendment* and procedural due process claims and granting injunctive relief on these claims; (2) reverse the district court's decision finding for Brentwood on its substantive due process claim; (3) reverse the district court's decision finding that Carter is not entitled to qualified immunity; (4) reverse the district court's order finding that the TSSAA is entitled to antitrust immunity; and (5) remand for further proceedings on Brentwood's antitrust claim.

DISSENT BY: ROGERS

DISSENT

ROGERS, Circuit Judge, dissenting:

High school football is a game. Games have rules.

To have federal courts, under the guise of applying the enduring principles of the *First Amendment*, reverse the ordinary application of high school football recruiting rules—where the core values of the Amendment are not even remotely involved—unduly trivializes these constitutional principles. This is no more a case involving our nation's ideal of freedom of expression than a case

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[27] In its brief, Brentwood argues that the district court's injunction should also be directed at Carter in his official capacity. It is unclear why Brentwood makes this argument or why this should be the case, as the injunction enjoins all of the penalties imposed by the TSSAA against Brentwood. The injunctive relief was thus complete.

involving a coach who is thrown out of a game for talking back to a referee. This is instead a case involving game participants who challenge the discretionary administration of participation rules. Of course, good lawyers can characterize almost any perceived injustice as a constitutional case (and maybe even an antitrust case to boot), but courts should be hesitant to go along.

The Supreme Court has properly instructed us in this case that the defendant is a state actor for constitutional purposes, and this court in its 2003 decision properly determined that Brentwood Academy did not contract away all of its constitutional rights by joining TSSAA. If, for instance, TSSAA discriminated on the basis of race or religion or the expression of political views, the earlier court holdings in this case would insure the availability of federal court relief. But here TSSAA is clearly doing nothing more than administering its game rules-the game being interschool high school football. Dissatisfaction with application of game rules does not become a *First Amendment* violation merely because the rule involves speech.

Recruiting and eligibility rules are of course a very real part of the game itself, protecting the student-athlete and the brand of competition agreed to. The game of football, like any game, has rules which the competitors accept as an inherent part of participation. In addition to the basics of the game, such as how many players may participate at one time and how many points are awarded for a touchdown, competitors agree on further rules governing competition more broadly, agreeing on rules that govern how teams are grouped into leagues, how the champion of the league is determined and who is eligible to participate in a game. Fierce competition among high schools for talented student athletes, and the demand for success from fans and alumni, bring the potential for excess. As a result, athletic leagues comprised of educational institutions, such as TSSAA, have

rules governing both the recruitment of student-athletes and the eligibility of student-athletes to participate in athletic contests. Anti-recruiting rules may inhibit "speech," but so do the ordinary rules of a football game that allow players and coaches to be removed for disputing the propriety of a referee's call.

Accordingly, I dissent from those portions of the majority's decision upholding plaintiff's *First Amendment* claims. I also dissent from the finding of a due process violation and from the decision to reverse the district court's determination that there is no basis for antitrust liability in this case.[1]

I.

While the insubstantiality of plaintiff's *First Amendment* claim is clear, the complexities of modern *First Amendment* jurisprudence make it less clear precisely why the claim is not substantial. There are two parts to the answer. First, ordinary enforcement of game rules does not amount to an unconstitutional limit of free expression in part because participants agree to play in the games. Second, ordinary enforcement of game rules does not amount to an unconstitutional limit on free expression because rules (including rules limiting speech) are inherently necessary to ordered competition. Of course these two ideas substantially overlap, but they find expression in different strands of *First Amendment* law. Both strands reflect the underlying idea that rules have value for the sake of being rules, and only trench on *First Amendment* concerns when their relationship to the game is too attenuated. Enforcement of the recruitment rule in this case is clearly warranted because Brentwood agreed to general applicability of the rules (although not to rules that draw distinctions unrelated to the purpose for the rules,

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[1] I concur in Part II.C. of the majority opinion rejecting Brentwood's substantive due process claim.

such as interpretations of the rules that discriminate, for example, on the basis of political party affiliation). Enforcement of the recruitment rule in this case is also clearly warranted because, in the context of athletic competition, the rule is sufficiently related to legitimate public interests and narrowly tailored. Under each of these arguments, and certainly under at least one of the two, there is no *First Amendment* violation in this case.

I recognize that the first argument is subject to the criticism that it ignores our earlier 2001 decision and renders the extensive district court proceedings on remand an exercise in futility. In addition, the second argument is subject to the criticism that it does not adequately defer to the factual findings of the district court. While I am sympathetic with the inclinations undergirding these arguments, I cannot in the end accept that they compel us to affirm the finding that enforcement of an unexceptional athletic anti-recruiting rule violates the *First Amendment*.

A.

First of all, Brentwood agreed to comply with TSSAA anti-recruiting rules, and thus gave up its right to engage in some expressive activity otherwise protected by the *First Amendment*. That is not to say that it gave up all of its rights to engage in expressive activity vis-a-vis TSSAA. But it obviously gave up some. By comparison, a person by accepting employment by the government gives up some rights protected by the *First Amendment* (*e.g.*, the right to read the newspaper all day long), but does not give up all *First Amendment* rights (*e.g.*, the right to talk politics during a break). Brentwood in this case gave up its right to engage in certain types of speech, and may not assert such a right now. *See Leonard v. Clark*, 12 F.3d 885, 889-90 (9th Cir. 1993) (affirming the district court's decision not to reach the issue of whether a labor union's free speech rights had been violated where the district court had first determined that the union waived its *First Amendment* protections in a

collective bargaining agreement). Brentwood in short gave up its right to speak in violation of TSSAA's game rules (including its anti-recruiting rules) as consideration for access to TSSAA leagues and tournaments, and to benefit from TSSAA's enforcement of its rules against competitors.

1. Free Speech Rights May Be Given Up

Most individually held constitutional rights may be waived, if done knowingly, intelligently, and with sufficient awareness of relevant circumstances and likely consequences. *See Brady v. United States*, 397 U.S. 742, 748, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970) (recognizing waiver of the constitutional right to a trial in a criminal case); *Leonard*, 12 F.3d at 88990 (upholding a contractual waiver of *First Amendment* rights where it was knowing, voluntary, and intelligent); *Erie Telecomms. v. Erie*, 853 F.2d 1084, 1096 (3d Cir. 1988) ("constitutional rights, like rights and privileges of lesser importance, may be contractually waived where the facts and circumstances surrounding the waiver make it clear that the party foregoing its rights has done so of its own volition, with full understanding of the consequences of its waiver").

The power to waive individually held constitutional rights extends to *First Amendment* speech-related protections. The Supreme Court has repeatedly held that contractual waivers of free speech protections may be judicially enforced. In *Snepp v. United States*, the Supreme Court held that the Central Intelligence Agency (CIA) was not barred by the *First Amendment* from enforcing an employment agreement that required CIA employees to get its permission before publishing writings about agency activities. 444 U.S. 507, 507-511, 100 S. Ct. 763, 62 L. Ed. 2d 704 (1980). The Court upheld this prior restraint on speech in part because the CIA employee in that case had voluntarily signed the employment agreement. *See id.* at 510-11. Similarly, in *Rust v. Sullivan*, the Court upheld the federal government's restriction on the abortion-related

speech of staff members working for doctors receiving Title funds. *500 U.S. 173*, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991). The Court upheld this restriction because it was "a consequence of [the staff members'] decision to accept employment." *Id.* at 199.

The Third, Fourth, and Ninth circuits have also honored contractual waivers of *First Amendment* rights contained in contracts with state actors. *Erie Telecomms.*, 853 F.2d at 109498 (upholding a cable company's waiver of *First Amendment* rights in a franchise agreement with a city); *Lake James Cmty. Volunteer Fire Dep't., Inc. v. Burke County*, 149 F.3d 277, 280-82 (4th Cir. 1998) (holding enforceable a Fire Department's "limited waiver" of some *First Amendment* rights in a contract with a county government); *Leonard*, 12 F.3d at 889-92 (upholding a labor union's waiver of some *First Amendment* rights to a city as provided in a collective bargaining agreement).

While these cases demonstrate that constitutional rights can be bargained away, they do not begin to cover all the possibilities. Some constitutional rights are so obviously alienable that no one would challenge the idea. To become a prison guard, a person may give up the right to be out of the prison premises for eight hours a day. To become a judge, a person may give up the right to solicit charitable contributions. To become a flight attendant, a person may give up the right to refrain from speaking before the plane takes off. And so on. Again, this is not to say that such persons give up all free expression rights, but they certainly give up some.

2. Brentwood Gave Up its Right to Certain Speech

In this case Brentwood gave up some of its free speech rights when it signed a one-year contract agreeing to abide by TSSAA's game rules, including its anti-recruiting rules. Brentwood's promise is not materially different from the CIA's employment agreement or the speech restrictions on the *Rust* staff employees. In each of these situations, the

promisors agreed not to speak in certain ways in return for something they desired.

Brentwood's waiver was doubtless knowing, voluntary, and intelligent. The anti-recruiting rule and supplemental materials explicitly forbade Coach Flatt from "contacting a student or his or her parents prior to his enrollment in the school." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 262 F.3d 543, 549 (6th Cir. 2001). Nothing could be clearer, and Coach Flatt did exactly this. His waiver—and his violation of this crystal clear rule—were voluntary, knowing, and intelligent. Moreover, there is no evidence on the record that would suggest that Brentwood had agreed to TSSAA's rules involuntarily or without knowledge. That Brentwood, a sophisticated and tenacious party, never contested in this appeal that it understood the anti-recruiting rules tells volumes about the intelligence of its waiver.

3. Brentwood's Waiver Has No Unconstitutional Conditions Doctrine Defect

Brentwood's waiver does not run afoul of the "unconstitutional conditions" doctrine because the anti-recruiting rules relate to participation in TSSAA athletics and Coach Flatt's recruiting letter and follow-up phone calls do not bear on matters of public concern.

"Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the" right surrendered. *Dolan v. City of Tigard*, 512 U.S. 374, 385, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994) (citing *Perry v. Sindermann*, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968)). When the free speech rights of government employees are at issue, this doctrine prevents the surrender of speech rights only if the speech

bears on some matter of public concern. *Connick v. Myers*, 461 U.S. 138, 146, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983). In this case the unconstitutional conditions doctrine will invalidate Brentwood's waiver only if Brentwood's membership in TSSAA has "little or no relationship" to the free speech rights surrendered (i.e., to the anti-recruiting rules); or if, applying the *Connick* standard, Coach Flatt's recruiting speech bore on a matter of public concern.

The anti-recruiting rules relate to participation in TSSAA and limit no speech on any matter of public concern. By limiting Coach Flatt's right to recruit unenrolled middle-school students for the football team, the anti-recruiting rules regulate the formation of teams that compete in TSSAA. It is an off-the-field regulation thought to enhance the quality of on-the-field competition by promoting equity in the relative strength of teams. The anti-recruiting rules, therefore, have a clear relationship, not "little or no relationship," to participation in TSSAA. Obviously, there is no reason to think that Coach Flatt's recruiting letter or follow-up phone calls touch upon any matter of public concern under *Connick*. Consequently, there is no unconstitutional conditions doctrine defect in Brentwood's agreement to comply with recruitment rules.

There is no reason to limit the *Connick* no-public-concern analysis strictly to government employee cases. *Connick* is analogous because the restriction on Brentwood's recruiting speech emanates from the necessity of limiting game participants' speech as part of the competitor-referee relationship. *Cf.* Maj. Op. at 8 (observing that lawful restrictions on government employees' speech emanate from the necessity of limiting their speech as part of the employer-employee relationship). The operation of a sports league demands speech limits that are germane to the agreed-upon venture no less than does employment. To extend an earlier analogy, a government employee harms the employer-employee relationship when he exercises his

First Amendment right to read the newspaper for his entire workday. Likewise, Coach Flatt harmed the competitor-referee relationship between Brentwood and TSSAA when he disobeyed anti-recruiting rules that others were presumably following.

Brentwood's promise to follow the anti-recruiting rules has no unconstitutional conditions doctrine defect because it has a relationship to Brentwood's participation in TSSAA and limits no speech of public concern. Brentwood's *First Amendment* claims should be dismissed.

4. Our 2001 Opinion Leaves Open the Possibility That Brentwood Gave Up Those Free Speech Rights That Might Interfere With TSSAA Game Rules

In my view, this court's 2001 opinion does not at all foreclose the foregoing argument. *Compare* Maj. Op. at 7; *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 262 F.3d 543, 550 (6th Cir. 2001). The 2001 opinion on the contrary rejected a different and overly broad theory of waiver: that Brentwood had given up its right to sue entirely. *See id.* The 2001 opinion noted that the cases cited by TSSAA in support of this overly broad waiver theory involved parties that had explicitly "waived their right to *sue*," and concluded that "there is no comparable TSSAA provision prohibiting members from *challenging the constitutionality* of the recruiting rule." *Id.* (emphasis added). In other words, the 2001 opinion says only that Brentwood did not waive its right to sue *generally*. That is true. While retaining its right to sue generally, Brentwood waived a more limited group of rights-including any free speech-related theories that would invalidate the normal administration of rules that Brentwood agreed to, including the anti-recruiting rules. Brentwood could for instance sue on the basis of the unconstitutional conditions doctrine and indeed this court relied upon such cases in our rejection of the blanket waiver argument. *See id.*

By analogy, the staff personnel in *Rust* did not waive their right to sue about their employment conditions or free speech rights generally. Surely a court could have heard a political discrimination claim brought against the government funding authority by any such staff members. Yet the Court still held that the staff members, by accepting employment, waived *First Amendment* objections to *Title X*'s abortion-speech restrictions. *See Rust*, 500 U.S. at 199 ("employees' freedom of expression is limited during the time that they actually work for the project; but this limitation is a consequence of their decision to accept employment in a project, the scope of which is permissibly restricted by the funding authority"). In this case, Brentwood waived only speech rights that would interfere with its agreement to abide by TSSAA's game rules and that did not violate the unconstitutional conditions doctrine.

The 2001 opinion never addressed this narrower theory of waiver and thus does not foreclose any and all arguments based on waiver. Brentwood waived its right to have Coach Flatt contact as yet unenrolled students. Its *First Amendment* claim should be dismissed on that ground.

B.

While our previous decision did not foreclose the above argument, it did direct the lower court to apply the test for content-neutral speech restrictions, and I certainly respect the majority's reluctance to disregard the district court's extensive factual inquiry. In my view, however, none of the district court's factual findings are sufficient to warrant the legal conclusion that Brentwood's *First Amendment* rights were violated by TSSAA's enforcement of the anti-recruiting rules. The very nature of game rules requires that they be somewhat arbitrary. If upon remand the district court had found a restriction on speech of a public concern, or a restriction on speech unrelated to the game of football, our review of the district court's conclusion might

support affirmance. Nothing like that was found in this case.

In this case, TSSAA's game-related legitimate interests in subordinating athletics to academics, preventing the exploitation of middle school student-athletes, and furthering competitive equality of teams, together fully justify the enforcement of the anti-recruiting rules against Brentwood. The anti-recruiting rules are reasonable time, place or manner restrictions on speech that are narrowly tailored to serve a significant government interest and leave open alternative channels of communication. *See Ward v. Rock Against Racism*, 491 U.S. 781, 799, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989); *Tucker v. City of Fairfield*, 398 F.3d 457, 463-64 (6th Cir. 2005). The anti-recruiting rules, as applied to Coach Flatt for the spring practice letter and the follow-up phone calls, are narrowly tailored. The rule by its terms is limited to contacts "to secure or to retain a student for athletic purposes . . . ." The rule also leaves open alternative channels of communication. Coach Flatt could have distributed recruiting letters to private athletic leagues not affiliated with any school system near Brentwood's geographic area, or he could have distributed such materials to the administration of any public or private school with a request that those schools give them to students. The rule expressly endorses another alternative channel: potential students who on their own initiative contact the coaching staff seeking enrollment or financial aid information may be referred to Brentwood's principal, admissions department, guidance department, or the person in charge of financial aid.

The majority relies extensively on the required "roadmap" of our previous opinion in this case, but following that roadmap leads directly to the conclusion that there is no *First Amendment* violation. We held, in approximately one page of analysis, that the anti-recruiting rules amount to a content-neutral regulation subject to intermediate

scrutiny. 262 F.3d at 553-54 (Part D). We also held, in another page of analysis, that the district court on remand should determine if the anti-recruiting rules are narrowly tailored to meet TSSAA's substantial interests. *Id.* at 557-58 (Part F).

Repeatedly cited in those two pages are the adult entertainment ordinance case of *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986), and the New York rock concert case of *Ward v. Rock Against Racism*, 491 U.S. 781, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989). Under the indisputably applicable analysis of those cases, it is not possible to find a *First Amendment* violation on the primary factual findings of the district court in this case.

The zoning ordinance at issue in *Renton* prohibited the location of adult theatres within 1000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. 475 U.S. at 43. The Court held that the ordinance was to be evaluated under the test for content-neutral time. place, and manner restrictions on speech. *Id.* at 46-50. This is the test that we previously held to be applicable to the particular anti-recruiting rules in this case. The test is whether the ordinance "is designed to serve a substantial governmental interest and allows for reasonable alternative means of communication." *Id.* at 50. The Court upheld the ordinance, ruling that the City could rely on the experiences of other cities "so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Id.* at 51-52. The Court rejected arguments that the ordinance was underinclusive or that it did not allow reasonable alternative means of communication.

Similar analysis compels a rejection of Brentwood's *First Amendment* claim. In *First Amendment* jargon, TSSAA is attempting to regulate the negative secondary effects of Brentwood's speech: the exploitation of middle

school athletes, the subordination of academics to athletics, and unevenly matched teams. The district court recognized the validity of these interests. 304 F. Supp. 2d at 994. TSSAA has furthered these interests by restricting communication between the coach and a student prior to enrollment, just as many cities have restricted the erotic message of dancers by keeping it away from residential areas and churches. In both cases, the negative secondary effects are controlled by restricting the time and the nature of the messages a speaker may convey. In the context of a content neutral, time, place, or manner ordinance regulating adult oriented businesses, "the *First Amendment* does not require a city, before enacting . . . an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Renton*, 475 U.S. at 51-52. "*Renton* . . . does not require a 'city to demonstrate, ... with empirical data, that its ordinance will successfully lower crime', at least 'not without actual and convincing evidence from plaintiffs to the contrary.'" *Baby Dolls Topless Saloons, Inc. v. City of Dallas*, 295 F.3d 471, 481 (5th Cir. 2002) (quoting *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438, 122 S. Ct. 1728, 152 L. Ed. 2d 670 (2002) (plurality opinion)). Under *Renton*, an ordinance regulating adult oriented businesses is valid so long as a city reasonably concludes that the time, place or manner restriction will be effective in curtailing the negative secondary effects of the businesses; empirical proof that the regulation is effective in lowering prostitution or crime in the case of every establishment affected by the ordinance is not required. *See Alameda Books*, 535 U.S. at 43839.

It is not right to say that because the parents in this case were happy to receive the letter and that there was no exploitation of students or subordination of academics in this particular case, TSSAA has relied on "shoddy data or

reasoning" that does not "fairly support [its] rationale" for the enforcement of the anti-recruiting rules against Brentwood. *Compare* Maj. Op. at 15 (quoting *Alameda Books*, 535 U.S. at 438). Applied to an adult oriented business, such reasoning would allow the owner of an adult business to mount an as-applied *First Amendment* challenge to a zoning ordinance if she could show that there were no negative secondary effects, such as prostitution or crime, at *her* establishment. Such is not the state of the law. The anti-recruiting rules, like restrictions on an adult oriented business, operate in the aggregate and are judged based on the overall effect on speech; a city is not required to show that every cabaret affected by an ordinance causes an increase in crime and prostitution before the ordinance can be applied to that business. The aggregate overall increase in crime from an adult oriented business is sufficient to force the operators of those businesses to disperse or congregate. Similarly, TSSAA is not required to demonstrate that each time it enforces the anti-recruiting rules it is stamping out the exploitation of student athletes or the bending of academics to the will of athletics for the anti-recruiting rules to be valid. It is sufficient that, in the aggregate, contact between an authority figure such as a coach and a potential student-athlete may lead to the exploitation of student athletes or the subordination of academics to athletics to justify restricting contact between coach and potential student. All TSSAA must show is that it had a reasonable belief that contact between a coach and a prospective student had the potential for abuse in order to restrict such contact, so long as alternative avenues to communicate the message are left intact. The record here shows such a reasonable belief.[2]

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[2] The majority makes the remarkable observation that TSSAA provided no "evidence to support the notion that ensuring that high schools compete in interscholastic sports in an equitable manner is a substantial state interest," and no evidence "explaining why competitive

Moreover, the anti-recruiting rule as applied to Brentwood is narrowly tailored and leaves Brentwood alternative channels to communicate its message. Communications not for athletic purposes are of course permitted. Moreover, had the spring practice letter been distributed to representatives of private sports leagues near Brentwood, school administrators of other schools with a request for distribution, or students who on their own had contacted appropriate Brentwood officials, there would be no violation of the anti-recruiting rules.[3]

The as-applied nature of the district court's inquiry does not require a different conclusion. A rule that precludes coach contact with not-yet-enrolled incoming students cannot be constitutional on its face if the underlying purposes of the rule have to be demonstrated every time the rule is applied in order to survive an as-applied challenge. Otherwise there would be no basis for having the rule. Just

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equity is an important value." Maj. Op. at 12. Presumably the City of Renton need not provide evidence for the obvious proposition that crime increases are against the public interest, and New York in the *Ward* case need not provide evidence that appropriate modulation of band concerts is in the public interest. Similarly, it can hardly be argued that TSSAA needs to provide evidence for the obvious proposition that more evenly balanced high school football matches are in the public interest.

[3] The majority opinion also discounts the interpretive commentary accompanying the anti-recruiting rules as non-binding to find that the anti-recruiting rules are not narrowly tailored and burden substantially more speech than necessary. Maj. Op. at 13. Thus, the majority avoids the fact that Brentwood was punished for behavior specifically cited as examples of conduct that would violate the anti-recruiting rules. The commentary to the anti-recruiting rules is non-binding only to the extent that TSSAA has a certain amount of discretion in enforcing the rule, and the examples cited in the interpretive commentary are a nonexclusive list. The discretion vested in TSSAA under the anti-recruiting rules is not so broad that the anti-recruiting rules, despite content neutrality, become a de facto prior restraint on speech. *See City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988) (no standards for denial or grant of permit for newsrack on public property); *Cantwell v. Connecticut*, 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940).

as the City of Renton does not have to show ill-effects from each proposed adult theatre placement in order to enforce its rule, and just as New York in the *Ward* case does not have to show ill effects each time it requires a band to use city provided sound technicians, TSSAA does not have to show ill effects each time it punishes coach contact with not-yet-enrolled students.

This conclusion is further supported by the traditional deference given to educators in carrying out policies that affect *First Amendment* rights. This dispute arises in the context of high school education, and the courts have consistently given great deference to educators' decisions that have an impact on *First Amendment* rights. The Supreme Court has recognized the "important, delicate, and highly discretionary functions" that the educational system undertakes, and emphasized a consistent concern for "the need [to] affirm the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969). As this court has stated, "In the *First Amendment* arena . . . the Supreme Court . . . has frequently emphasized that public schools have considerable latitude in fashioning rules that further their educational mission and in developing a reasonable fit between the ends and means of their policies." *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 393 (6th Cir. 2005). While not a public school, TSSAA is a part of the educational system that regulates what both parties concede is an important part of the high school experience. TSSAA should enjoy greater latitude in fashioning and applying recruiting rules that prescribe and control the conduct of overzealous coaches to further its educational mission, consistent with fundamental constitutional safeguards.

The Supreme Court and our court have both recognized that the federal courts are ill-equipped to regulate high

school education. "It long has been the case that constitutional claims generally receive less rigorous review in the secondary and middle school setting than they do in other settings." *Id.* Federal courts are even less well-equipped to regulate high school athletics.

Finally, I note the "Catch-22" implication of the argument that the particular application of the anti-recruiting rules violated the *First Amendment* in this case. By prohibiting all communication between coaches and un-enrolled students, the regulation is more rigorously content neutral. The more the prohibition is "tailored," for instance by permitting some types of communication but not others, the less content neutral it becomes. An attack on the particular application of the no-communication rule thus gives TSSAA the Hobson's choice of (1) making the prohibition more content specific, thereby coming closer to treading on *First Amendment* values, or (2) discarding the rule-not required if the rule is facially valid.

II.

Brentwood's procedural due process rights were not violated because the presentation of *ex parte* evidence, if any, did not affect TSSAA's final decision.

Based on TSSAA's written decision and the testimony at trial, the district court clearly erred in determining that the TSSAA Board of Control heard *ex parte* evidence related to Bart King during its deliberations following Brentwood's final hearing, and that the allegations regarding Mr. King were a basis for the penalty imposed. The only support for the district court's finding that the King allegations were a basis for Brentwood's punishment are two statements by TSSAA Board of Control President Mike Reed. In his deposition, Mr. Reed stated that the King allegation was one of the reasons Brentwood was found to have violated the anti-recruiting rules. At trial, Mr. Reed disclaimed his deposition testimony, stating that Brentwood's final penalty was due to Coach Flatt's letter rather than Mr. King's

activities. He went on to state that the Bart King allegations were a "factor" in "what was going on and so forth," interrupting Brentwood's counsel before the follow up question was finished.

With all due respect to the district court's better position to judge the credibility and demeanor of witnesses, the district court clearly erred in determining that Mr. Reed's single statement at deposition was sufficient to show that *ex parte* evidence was presented to the Board of Control and formed a basis for the penalty imposed on Brentwood. Michael Hammond and Ronnie Carter, in addition to Mr. Reed, testified that the King allegations were not a basis for the final penalty. Mr. Hammond further indicated that the discussion of the King allegations during the Board of Control's private deliberations was superficial. Gene Meness and Bernard Childress, the TSSAA investigators who looked into the King allegations, could not recall answering any question from the Board of Control related to Mr. King. Indeed, it is unclear what evidence they could have presented given that they did not interview Mr. King and the investigation consisted of a series of letters between Brentwood's headmaster and TSSAA. In short, other than a single statement in a lengthy deposition, there is no evidence that TSSAA based its final penalty on *ex parte* evidence related to Bart King and the district court clearly erred in resting the entire weight of its finding that Brentwood's procedural due process rights were violated on so slender an evidentiary reed.

III.

Finally, the fact that TSSAA has been granted state authority to regulate athletic competition requires us to affirm the district court's conclusion that state antitrust immunity applies in this case. TSSAA is entitled to state antitrust immunity because, as an agent of the Tennessee Board of Education (the Board), TSSAA partakes of the Board's state authorization to displace competition. TSSAA

has done so using foreseeable means pursuant to clearly articulated Tennessee policy. As a result, TSSAA satisfies the applicable test for state antitrust immunity designed for municipalities and state political subdivisions. I would therefore affirm the decision of the district court granting summary judgment in favor of the TSSAA on Brentwood's antitrust claims based on state antitrust immunity.

A. TSSAA is the Tennessee State Board of Education's Agent

TSSAA is an agent of the Board and, as such, receives state antitrust immunity if it satisfies the test for municipalities or state political subdivisions. Our ruling in *Consolidated Television Cable Service, Inc. v. City of Frankfort* indicates that TSSAA is an agent of the Board. 857 F.2d 354 (6th Cir. 1988). In that antitrust suit, we held that a municipal cable television corporation (that obviously was not itself a city) was an agent of the City of Frankfort and thus should receive state antitrust immunity if it satisfied the test for municipalities. *Id.* at 358-60. We classified the corporation as the City's agent because the City exercised "ultimate control" over the corporation. *Id.* at 359.

More specifically, the City had "ultimate control" over the corporation because (1) it was a municipal corporation; (2) the corporation's form and method had been dictated by the City; (3) the corporation existed at the City's pleasure; (4) and the City appointed one half of the corporation's board of directors. *See Consolidated*, 857 F.2d at 358-59.

Analogously, the Board exercises "ultimate control" over TSSAA. The Board enjoys ultimate control over TSSAA because the Board delegated to TSSAA all of TSSAA's regulatory powers and therefore can revoke its authority at any time. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 13 F. Supp. 2d 670, 67981 (M.D. Tenn. 1998). The Board wields a general power to review, approve, or reaffirm the content of TSSAA's

regulations. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 292-93, 299-301, 121 S. Ct. 924, 148 L. Ed. 2d 807 (2001). At its whim, the Board can revoke any TSSAA rule it dislikes. *See id.* The Board's review power implicitly disciplines TSSAA. *See id.* Moreover, the Board's chairman has power to designate a person or persons to serve in an ex-officio capacity on TSSAA's governing bodies. *Id.* at 292. The Board may thus directly influence TSSAA's most minute decisions by populating its decision-making bodies with people of its selection. The Board's complete dominion over TSSAA is "ultimate control" under *Consolidated*, making TSSAA the Board's agent.

B. The State Antitrust Immunity Test for Municipalities and State Political Subdivisions Applies to TSSAA's Allegedly Anticompetitive Conduct

Because TSSAA is the Board's agent, and the Board is a state agency, TSSAA need only satisfy the state antitrust immunity test for municipalities or state political subdivisions, not the more stringent test for private actors. *See Consolidated*, 857 F.2d at 359-62 (applying the test for municipalities to an agent of a municipality). In *Consolidated* we read *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985), clearly to hold that the requirement of "active supervision" applied "only when the actor is a private party rather than a municipality." *Consolidated*, 857 F.2d at 360. The test for municipalities and state political subdivisions allows TSSAA to act anti-competitively pursuant to "clear articulation of a state policy to authorize anticompetitive conduct." *See Town of Hallie*, 471 U.S. at 40-42 (internal quotation omitted). Tennessee law need not explicitly demand or permit displacement of competition. *See id.* at 41-42. The anticompetitive conduct need only be the "foreseeable result" of state authorization. *Id.* at 42.

C. Tennessee's Policy to Displace Competition in Interscholastic Athletics is Evident in Its Broad Grant of Authority to Regulate Interscholastic Athletics

Tennessee's policy to displace competition in interscholastic sports may be inferred from its grant of authority to the Board. As the Supreme Court has noted, Tennessee law vests in the Board wide-ranging authority to regulate primary and secondary education. See *Brentwood Acad.*, 531 U.S. at 292 (citing *TENN. CODE ANN.* § 49-1-302). Section 49-1-302 grants broad powers that include the authority to regulate athletics programs; this section further serves as the basis for TSSAA's status as the agency responsible for regulating interscholastic school sports in Tennessee. *See id.* Under the Supreme Court's decision in *City of Columbia v. Omni Outdoor Advertising*, such broad authority to set restrictions on competitive endeavors makes evident the state's policy to displace competition. *See* 499 U.S. 365, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991).

In *Omni*, the Supreme Court held that state antitrust immunity applied to a city that had used its state-granted zoning authority to restrict billboard construction. *See id.* at 368-79. In holding that state delegation of zoning authority to a city evinces a state policy to displace competition, the Court said: "The very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition, particularly on the part of new entrants. A municipal ordinance restricting the size, location, and spacing of billboards (surely a common form of zoning) necessarily protects existing billboards against some competition from newcomers." *Id.* at 373. Consequently, the mere delegation of zoning authority to the city adequately evinced a state policy to displace competition.

In this case, the delegation to TSSAA of comprehensive power to regulate interscholastic athletics is the equivalent

of the city's grant of zoning authority in *Omni*. Just as the exercise of zoning authority in *Omni* stopped a company from competing in the billboard construction market, TSSAA's anti-recruiting rules restrict schools' efforts to build their best teams by wooing talented players with scholarships or perquisites. In a broader sense, also, TSSAA's potential efforts to determine the venues of games, what teams will face each other, the grouping of schools into divisions, the dates of the athletic seasons or pre-seasons, and any number of other restrictions run the risk of "preventing normal acts of competition" in a manner analogous to the zoning authority in *Omni*. Such regulations are a "foreseeable result" of Tennessee's decision to authorize the statewide regulation of interscholastic sports.

The Supreme Court has impliedly acknowledged the inherent need for rules that "prevent normal acts of competition" in the football context. The Court has written regarding the National Collegiate Athletic Association (NCAA):

> What the NCAA and its member institutions market in this case is competition itself—contests between competing institutions. Of course, this would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed. A myriad of rules affecting such matters as the size of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed, all must be agreed upon, and all restrain the manner in which institutions compete. Moreover, the NCAA seeks to market a particular brand of football—college football.

NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 101-102, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984). These

sorts of restrictions, and their anticompetitive effects, are no less foreseeable here.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRENTWOOD ACADEMY
PLAINTIFF-APPELLEE / CROSS-APPELLANT,

v.

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION, ET. AL.,
DEFENDANTS-APPELLANTS / CROSS-APPELLEES.

NO. 03-5245/5278.

[FILED]
[JUNE 27, 2006]
[LEONARD GREEN, CLERK]

Before GIBBONS and ROGERS, Circuit Judges;
and BELL, *District Judge.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission

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* Hon. Robert Holmes Bell, Chief United States District Judge for the Western District of Michigan, sitting by designation.

and decision of the cases. Accordingly, the petition is denied. Judge Rogers would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT.

/s/Leonard Green
Leonard Green
Clerk

CONSTITUTION

* * *

ARTICLE V
Executive Director

Section 1. The Executive Director shall be elected for a term of three years by the Board of Control.

Section 2. Under the direction of the Board of Control the Executive Director shall receive, hold, expand and account for all funds of the Association.

Section 3. He shall maintain the records and property of the Association.

Section 4. He shall initiate investigations, conduct hearings, collect information, render decisions and fix penalties based on the evidence, and in accordance with the rules and regulations of the TSSAA. Such decisions shall be subject to review by the Board of Control on appeal by the principal of the member school involved.

Section 5. He shall attend all meetings and serve as secretary of the Board of Control, and of the Legislative Council.

Section 6. He shall be an ex-officio member of all committees of the Board of Control and of the Legislative Council.

Section 7. He shall administer the rules and regulations governing the certification of officials as directed by the Board of Control.

ARTICLE VI
Hearings

Section 1. Any school charged with violating TSSAA regulations shall be notified of such charges by the Executive Director. If a hearing is desired by the school involved, the Executive Director must be notified immediately in writing. Provisions will then be made for such hearing, and the school so notified.

Section 2. A member school shall not be suspended from membership without first being given the opportunity to present its case at a hearing. Hearings shall be conducted by the Executive Director in the presence of two or more members of the TSSAA Board of Control who represent the Grand Division of the State in which the school is located, and who shall act in an advisory capacity. After testimony has been heard, the Executive Director shall meet in the executive session with the members of the Board of Control who are present at the hearing. After discussing with the Board members the evidence and possible penalties, the Executive Director shall decide what penalty, if any, is to be placed against the school.

Section 3. Any decision of the Executive Director may be appealed to the Board of Control. If the decision of the Executive Director is sustained, the school making the appeal shall defray the expenses for the meeting of the Board of Control in case a special meeting of the Board is called to consider the appeal.

Section 4. No member of the Board of Control shall serve on the Board while a case involving the school which he represents is being heard.

* * *

Constitution

1.

Q. How are members of the Board of Control and Legislative Council selected?

A. Members of the Board of Control and of the Legislative Council are selected at the annual regional meetings in the fall. Each school represented has one vote. The East Tennessee meeting is held in Knoxville, Middle Tennessee in Nashville, and West Tennessee In Jackson.

2.

Q. How may a school charged with violating TSSAA regulations present its case?

A. The principal of the school may request the Executive Director to call a hearing in regard to the charges. Such a hearing is held before the Executive Director and two or more Board of Control members representing the Grand Division of the state in which the school is located.

3.

Q. May a decision made by the Executive Director be appealed to the Board of Control?

A. Yes.

4.

Q. What procedure is followed by a school that wishes to appeal to the Board of Control a decision of the Executive Director?

A. The school principal should notify the Executive Director in writing that the principal wants the Board of Control to review the case. If it is satisfactory to hold the review of the case at the next regular meeting of the Board of Control, it will be listed on the agenda. If the case is of such nature that the school wants immediate action, the principal should so indicate. The Executive Director will then communicate with the president of the Board who will call a special session to consider the case. When such a special session of the Board is called, the school requesting the special session shall pay all expenses of the meeting in the event the Board of Control sustains the decisions of the Executive Director.

5.

Q. Does the Executive Director have a vote on matters that are presented to the Board of Control?

A. No. The Executive Director is not a member of the Board of Control and therefore can have no vote on matters being considered by it.

6.

Q. May a member of the Board vote on a matter involving the school which he represents.?

A. No. A member of the Board of Control cannot sit in on a case involving his or her own school.

7.

Q. How may a member school submit a proposal to amend the Constitution or to change the Bylaws?

A. By putting the suggested change in writing and filing it with the Executive Director no later than October 15 preceding the December meeting of the Legislative Council.

* * *

TSSAA ByLaws

ARTICLE I

Membership

Section 1. Secondary schools (also junior high schools) in the state, which are approved by the State Department of Education. State Department of Education approved agencies and/or The Southern Association of Colleges and Schools, both private and public, desiring membership in TSSAA may make application to the Board of Control. Applications for membership shall be approved or rejected by the Board of Control.

Member schools that withdraw from the TSSAA membership must be an affiliate member for one year upon application to renew membership.

Section 2. There shall be two divisions for athletic competition – the Senior High Division and the Junior High Division.

Schools which include grades 7-12, 8-12, 9-12 and 10-12 may compete in the Senior High Division. Schools in transition, if they do desire, may compete in the Senior High Division after the tenth grade has been added.

Schools which include grades 7, 8, 9; grades 8 and 9; or grades 9 may compete in the Junior High Division. (It will, therefore, be possible for some schools to compete in both the senior and the junior high divisions, while other schools will be able to compete in only one of the divisions. Even though the school may participate in both divisions it will hold only one membership in TSSAA.)

Schools with grades 7, 8, 9; grades 8 and 9 or grades 9 may compete in senior high division against senior high division "B" teams in regular season contests and "B" team individual tournaments provided they use 8th and 9th grade students only.

Section 3. The annual dues for a senior high school in Class A shall be $150.00, in Class AA $200.00, in Class AAA $250.00 and for a junior high school shall be $100.00. The TSSAA Legislative Council may not increase membership dues unless the increase is approved by a vote of TSSAA member schools.

Membership dues shall be paid in advance and shall be for the calendar year.

Section 4. Membership expires at midnight on December 31 of each year. Schools failing to renew membership before January 1 shall be charged a penalty of $25.00. The Executive Director shall notify by registered letter the principal of any school that has not renewed membership by January 1, and advise the principal that unless the membership fee and the penalty is filed immediately that the school will be dropped from the list of member schools.

Financial Statement

Section 5. The fiscal year of the Association shall be from July 1 to June 30. At the close of the fiscal year, the Executive Director shall publish a financial statement. All surplus funds shall be used as directed by the Board of Control.

Suspension

Section 6. The Executive Director and/or the Board of Control shall have power to suspend, to fine, or otherwise penalize any member school for the violation of any of the rules of the Association or for other just cause. The period of suspension or other penalty shall be left to the discretion of the Board of Control where the penalty is not fixed.

Section 7. Any school under suspension, if it has restricted its athletic program to intramural athletics for the period of suspension, may be reinstated by the Board of Control upon application made in writing, twenty days in advance of the time it desires to be reinstated, to the Executive Director by the principal of the school and by the Board of Education under which the school operates. The Executive Director shall present the application of the suspended school to the Board of Control for its consideration. The principal and the Board of Education shall agree in writing that the school will abide by all rules of the Association in the future. The principal and each member of the Board of Education shall sign the statement.

Section 8. If a school with one or more two-year contracts has its athletic program in any sport suspended for violation of TSSAA regulations and the first game of the two-year contract has played at the offending school such school shall be required to complete the contract, or contracts, when it resumes its athletic program if the school, or schools, affected desire.

Section 9. Suspension of a member school shall free all existing contracts between that school and other member schools.

Section 10. An attempt by a member school to permit a player to participate who has been declared ineligible by TSSAA shall free all existing contracts between that school and other member schools.

Section 11. Contracts made and entered into by member schools may be cancelled by mutual agreement or by authority of the Board of Control. All contracts between two schools shall be signed by the principals contracting.

Sponsored Sports

Section 12. TSSAA shall sponsor the following sports: baseball, girls' softball, basketball, cross country, football, golf, tennis, track, girls' volleyball, soccer and wrestling.

Cooperative Programs

Section 13. Two schools may petition TSSAA for permission to have a cooperative program in team sports (football, volleyball, basketball, baseball, softball, and soccer) if one of the schools does not have that program or has not had that program for the last five years. Only schools with the same grade configuration may combine to form a team and schools may co-op with only one other school (a maximum of two schools may combine to form a team). The Executive Director of TSSAA may approve such co-op programs subject to approval by principal of schools involved, School Board of schools involved, and the TSSAA Board of Control. When a co-op program has been formed between schools it must be re-evaluated after one year and subject to approval by the Executive Director.

ARTICLE II – Eligibility Rules

The member high schools of the Tennessee Secondary School Athletic Association have adopted, through their elected representatives, an essential inter-related group of minimum eligibility requirements which establish the threshold for participation for all students within the interscholastic program and which work together to define and preserve the fundamental nature

* * *

Recruiting Rule

Section 21. The use of undue influence on a student (with or without an athletic record), his or her parents or

guardians of a student by any person connected, or not connected, with the school to secure or to retain a student for athletic purposes shall be a violation of the recruiting rule.

1.

Q. How is undue influence interpreted in the recruiting role?

A. A person or persons exceeding what is appropriate or normal and offering an incentive or inducement to a student with or without an athletic record.

2.

Q. What is the penalty for violation of the recruiting role?

A. Violation of the recruiting rule shall cause the student to be ineligible at the school in violation, and a penalty shall be placed against the school.

3.

Q. Is it permissible for a coach to contact a student or his or her parents prior to his enrollment in the school?

A. No, a coach may not contact a student or his or her parents prior to his enrollment in the school. This shall apply to all students whether or not they have an athletic record.

4.

Q. What are some of the guides used in determining whether there has been undue influence used which would result in a violation of the recruiting rule?

A. Some examples are, but not limited to:

1. Providing of transportation or other inducement to any prospective student/athlete to take a qualifying examination at a school, meet with school officials, etc.

2. Discussion of financial aid based on need with any prospective student/athlete by any member of the coaching staff until the student has enrolled in school (attended 3

days of school). All financial aid questions should be referred to the principal or the person in charge of financial aid. If the person in charge of financial aid is a coach, prior approval must be granted by the Executive Director of TSSAA.

3. Any initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/athlete enrolled in any member school except where there is a definite feeder pattern.

4. Any initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/athlete in the seventh grade and above at any non-member school except where there is a definite feeder pattern involving the schools.

Public high schools may contact public feeder schools (elementary, middle school, junior high school) where there is a definite feeder pattern. Private or parochial schools may contact private schools (elementary, middle school, junior high school) where there is a definite feeder pattern.

Private or parochial schools may not contact students enrolled at the public schools. Public schools may not contact students enrolled at the private schools.

5. Any contact between a member of the coaching staff or representative of the school and prospective student/athletes prior to, during, or after contests at elementary schools, middle schools, and junior high schools except where there is a definite pattern.

6. A member school is prohibited from giving any item with school advertisement (shirts, pennants, caps, jackets, etc.)

7. Admitting students to athletic contests free of charge where there is an admission being charged at the contest except where there is a definite feeder pattern involved with the school.

5.

Q. What is allowed by member schools in contacting prospective students?

A. A representative of the school may meet with students at a school that is defined as a feeder school or meet with students who are zoned to attend that school the following year. This visit must be cleared by the principals of both schools.

Guidelines For Understanding The "Recruiting Rule"
and
Understanding "What Is Undue Influence?"

1. The major theme of the "recruiting rule" is not "initial contact." The major theme is "exceeding what is normal and appropriate." Initial contact can be a violation, but is only one of many things that can exceed what is normal and appropriate.

2. One key is not treating "athletes" or "prospective athletes" any differently than students who are not athletes.

3. Students should be seen as students and not singled out based on their potential athletic ability.

4. Pre-arranged contact is seen in the same manner as initial contact.

5. Any student or family or individual that contacts a coach about attending a school where he or she coaches should be informed that they need to contact the principal, admissions department, or guidance department if they have an interest.

6. Any meeting with coaches regarding athletes or prospective athletes or their families should be at the request of the family to the individual(s) responsible for admissions and should take place at the school.

7. High school athletics is not the same as colleges recruiting high school athletes for college athletics. High school athletics exist for an entirely different reason. High school coaches should not view 12, 13, 14 year old students in

the same manner as college coaches view high school seniors.

8. Administrators and coaches must realize that they have more responsibilities than the general public to understand the purpose of high school athletics, the principles behind the TSSAA rules, etc., and to maintain a level of understanding and purpose when dealing with the general public and students.

* * *

(25)

No. 06-427

In The Supreme Court of the United States

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION,
Petitioner,

v.

BRENTWOOD ACADEMY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, as stated in the Tennessee Secondary School Athletic Association's (TSSAA) Petition for Certiorari at 27-29, this Court should overrule its previous decision in this case that held (a) that TSSAA's sanctions against Brentwood Academy (BA), an independent school member of TSSAA, for pure non-commercial speech arose from a "regulatory enforcement proceeding", 531 U.S. 288, 293 (2001), and (b) that such TSSAA "regulatory activity ... should be treated as state action ...."? *Id.* at 291.

2. If the answer to Question One is no, whether, under longstanding First Amendment principles traditionally applied in a regulatory setting, TSSAA carried its burden of justifying its punishment of BA's pure non-commercial speech under the time, place, and manner doctrine (a) when the penalized speech is "harmless informational speech about a permitted athletic practice," 304 F. Supp.2d 981, 995; is "consistent with ... TSSAA's legitimate governmental interests," *id.*; "caused no actual harm and did not reasonably threaten harm to students, parents, or any legitimate governmental interests," *id.*; was addressed to "all the parents of all the male students who had applied, been tested and admitted, and signed enrollment contracts, students who had already decided to attend [BA]," *id.*; and was directed at "post-recruitment activity," *id.* at 996; and (b) when the basis of the enforcement action relies on the content of the speech; and depends on the discretionary and standardless judgment of the TSSAA and its Executive Director?

3. If the answer to Question One is no, whether TSSAA violated BA's procedural due process rights by (a) failing to inform BA of important evidence it relied on in sanctioning BA (actually misleading BA on the relevance of the evidence in question as the District Court found, *id.* at 1004 n.29), and (b) by failing to give BA an opportunity to respond timely to that evidence?

4. If the answer to Question One is yes, in whole or in part, what standards, if any, under the First Amendment and under procedural due process are appropriate to review the conduct of TSSAA and whether TSSAA has satisfied those standards?

RULE 29.6 STATEMENT

Respondent BA does not have a parent corporation, and no publicly-held company owns 10% or more of BA's capital stock.

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STATEMENT OF THE CASE

Some Preliminaries

1. TSSAA threatens its member school Brentwood Academy (BA), as an independent school, with expulsion (TSSAA calls this "exclusion") if BA remains successful in securing First Amendment protection against TSSAA's regulatory discipline. Pet. 14, 30.[1] TSSAA asserts that "[o]n a practical level…[t]he real issue" is whether TSSAA and all similar regulatory bodies will continue to exercise regulatory authority over private schools. Not leaving the answer to the imagination, TSSAA avers that "[i]f allowed to stand, the Sixth Circuit's analysis will inevitably lead to the exclusion of private schools from associations like TSSAA." *Id.* at 14.

This Court should not allow such improper, heavy-handed threats of retaliation – probably illegal in their own right – to influence its review-granting process. When this case was last here, 531 U.S. 288 (2001), this Court held that TSSAA's "regulatory activity," exercised "in lieu of the State Board of Education's exercise of its own authority," was state action, subject to constitutional scrutiny. *Id.* at 291. TSSAA proffered a Chicken Little scenario analogous to its threat of retaliation herein – that a finding that TSSAA was a state actor "will somehow trigger an epidemic of unprecedented federal litigation." *Id.* at 304. This Court rejected that claim, noting "no evident wave of litigation," *id.*, even though every other jurisdiction to have addressed the state action issue (going back to 1968) had found similar regulatory bodies to be state actors subject to constitutional

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[1] "Pet." citations refer to TSSAA's Certiorari Petition. "Tr." citations refer to the trial transcript. "CAJA" refers to the joint appendix filed in the Sixth Circuit in this appeal. "JA" refers to the joint appendix filed in the Sixth Circuit in the first appeal. "BIO" refers to TSSAA's Brief in Opposition to Certiorari in No. 01-1117. "Apx." refers to the Appendix herein.

scrutiny of their "regulatory activity." *Id.* at 291, 294 n.1. It should reject TSSAA's analogous threat herein.[2]

2. TSSAA's Petition asserts that BA "committed several ... intentional violations of the recruiting rule [RR]." Pet. 2. This is incorrect. BA's Headmaster Curtis Masters testified that "[f]rom the very beginning ... [BA's] intent was to abide by the recruiting rule to the letter."[3] Tr. 2226-27; 304 F. Supp.2d 981, 992.

Ronnie Carter, TSSAA Executive Director, has conceded that BA had no intent to violate RR. CAJA 1830, 1848. The parties so stipulated. CAJA 126 (¶40); 63 (¶91)

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[2] There is, unfortunately, precedent for TSSAA's threat of retaliation. TSSAA plays hardball. In *Crocker v. TSSAA*, 1990 U.S. App. LEXIS 12511 (6th Cir. 1990), the District Court enjoined TSSAA from imposing sanctions against a public high school for allowing Crocker to play interscholastic sports. After the injunction was dissolved on appeal, TSSAA immediately ruled that the school for which Crocker played "must forfeit all ... games in which Crocker had played" under the District Court's protective order. The Sixth Circuit overturned TSSAA's vindictive, retaliatory forfeiture action: "It would be unfair to penalize McGavock High School for actions that it took in compliance with a District Court order during the pendency of that order." *Id.* TSSAA's vindictive threat of retaliation is not a proper basis for granting Certiorari.

[3] Throughout this litigation, BA has supported a recruiting rule "that prevents inappropriate conduct" but that "allows the school to tell its story." Tr. 2228. Government can limit conduct to prevent "harmful behavior" in ways it cannot limit speech. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557, 579 (1995). This distinction between conduct and speech is one that TSSAA has steadfastly refused to recognize. At trial, no TSSAA expert witness drew a distinction between speech and conduct, condemning a monolithic, undifferentiated abstraction – athletic recruiting. *See, e.g.*, testimony of Dr. Sharon Stoll, who did not understand the difference between speech and conduct, since both can influence students: "I don't understand. Is there a difference between speech and conduct? ... I really don't understand... I don't see a difference." CAJA 1768-69. See also the testimony of Dr. George Sage, who also drew no distinction between speech and conduct, opining that "speech is a form of conduct." CAJA 1690.

("The TSSAA admits that Coach Flatt had no intention of violating the Recruiting Rule by mailing the Spring Practice Letters and making the telephone calls"). The District Court found that BA had no "scienter" to violate RR, 304 F. Supp.2d at 992 & n.5, 1002.[4]

3. TSSAA asserts that "many private schools in Tennessee join other athletic associations with different values and different rules." Pet. 2, 15. TSSAA does not point to any factual findings of the District Court to support this factual assertion, and there are none. The only District Court finding is to the contrary. In rejecting the assertion that BA "should either leave the TSSAA or change the TSSAA rules," the District Court stated that "TSSAA is effectively the only game in town." *Id.* at 997. In 2001, this Court noted that "[n]o school is forced to join" TSSAA, "but without any other authority actually regulating interscholastic athletics," nearly all high schools with athletic programs accept TSSAA's regulatory authority. 531 U.S. at 291.

TSSAA cites testimony by Carter to support its position. That testimony was not adopted by the District Court, and it is easy to see why. Carter asserted that there was a high school sports regulatory entity "in Chattanooga," but he was "not sure of the name." CAJA 868. Carter testified that a few independent schools had left TSSAA, but he could not "remember the year." *Id.* at 869. No evidence

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[4] TSSAA has been factual-accuracy challenged before in this case. The District Court characterized statements by and affidavits on behalf of TSSAA as being "disingenuous, at best" and "utterly false." 13 F. Supp.2d at 681, 685. To rebut the assertion that all public schools in Tennessee were members of TSSAA, Carter filed an affidavit listing public schools that were not TSSAA members. JA 214-16. Upon investigation, it turned out that all public high schools that have interscholastic athletic teams were TSSAA members. The schools listed in the Carter affidavit did not have interscholastic sports programs. Rather, they included "alternative" or special education schools (*e.g.*, for the physically disabled). JA 217-18.

in the record and no findings support TSSAA's assertion that viable regulatory alternatives to TSSAA exist for BA or other similar schools. *See* note 4, *supra*.

4. Subsequent proceedings in this matter remain in the District Court. BA's equal protection claim "has not been addressed by the Court of Appeals because the claim was added by Amended Complaint after this case was remanded to [the District] Court" in 2001. 304 F. Supp.2d at 1008. That claim raises both facial and as applied challenges to TSSAA's RR, which the District Court in its discretion declined to adjudicate in 2003. So, any decision by this Court on the merits would be subject to further litigation on the very same factual matters (under a different legal theory).

Similarly, since the Court of Appeals reinstated BA's antitrust claims, further proceedings on those issues still remain. 442 F.3d 410, 440-44. While those claims are analytically distinct, their ultimate resolution could have a significant effect on how TSSAA is organized and structured in performing its regulatory functions.

That further proceedings are still contemplated in the District Court does not deprive this Court of jurisdiction, "[b]ut in the absence of some ... unusual factor, the interlocutory nature of a lower court judgment will generally result in a denial of certiorari." ROBERT L. STERN, et al., SUPREME COURT PRACTICE 260 (8th ed. 2002).

5. No Sixth Circuit judge "requested a vote on the suggestion for rehearing en banc." Pet. Apx. 154a. Thus, Judge Rogers, who dissented from the panel decision and from the denial of panel rehearing, declined to recommend or vote for rehearing *en banc*. This strongly suggests that, even though he disagreed with the panel majority's decision, Judge Rogers believed that further appellate review beyond the panel was not appropriate or otherwise indicated.

Judge Rogers' view on *en banc* rehearing should counsel against Certiorari here. When this Court took this case in October Term 2000, there was a strong dissent urging

en banc reconsideration and noting creation of a circuit split on the very issue decided. 531 U.S. at 294. Neither of those factors is present herein.

6. TSSAA's analytical approach in this matter has been an opportunistic moving target. At summary judgment, the issue was whether RR and its application constituted content-based or content-neutral regulation. TSSAA asserted that RR was content-neutral – a "valid time, place and manner [TPM] restriction." The District Court rejected this defense: The RR "ban is content-based because the interests asserted by the Defendants to support the ban focus on the content of the message and the effect of the message on the listener." 13 F. Supp.2d at 687-88.

The Sixth Circuit found RR to be a "content-neutral regulation" subject to "reasonable [TPM] restrictions." The Sixth Circuit accepted TSSAA's analytical framework – TPM analysis with intermediate scrutiny rather than the strict scrutiny applied by the District Court. 262 F.3d at 553-54.

BA unsuccessfully sought Certiorari. No. 01-1117. TSSAA contended that RR was a content-neutral regulation that "must ... be viewed as a reasonable restriction on the time and manner of [BA's] solicitation of minors." BIO 15.

At trial, TSSAA could not sustain its content-neutrality claim. The District Court found that "the preponderance of the credible evidence at trial is that the substantive 'content' of the Spring Practice Letter and calls mattered and was a significant factor in the TSSAA's decision that the letter and calls constituted 'undue influence' and violated the Recruiting Rule. The TSSAA penalized [BA] for the substantive 'content' of the Spring Practice Letter and calls and the message they conveyed in this case." 304 F. Supp.2d at 991 n.4. Thus, TSSAA was unable to sustain its TPM defense, which it used to win reversal in the 2001 appeal and to resist review in this Court in No. 01-1117. TSSAA effectively abandoned its TPM

claim on appeal after trial and is now seeking review in this Court on an altogether different theory.

This is potentially very prejudicial to BA. The broad "public concern" solicitation issues raised in the context of BA's facial challenge, *see* 13 F. Supp.2d at 688-90, have been removed from the case as a result of the Sixth Circuit's 2001 decision, which narrowed the issues to an as applied First Amendment challenge. 262 F.3d at 555-56, 558.

7. To the extent that TSSAA seeks review on the application of TPM doctrine, Pet. 18-20, the Court should be aware of a problem in the record confronting TSSAA.

Interrogatory 47 put the following question to TSSAA: "Does TSSAA contend that the recruiting rule is 'narrowly tailored' to serve the governmental interests described in your response to the foregoing interrogatory number one? If so, explain in detail the factual support for any such contention." This was TSSAA's response, in relevant part: "TSSAA does not contend that the recruiting rule as applied is narrowly tailored to serve the governmental interests it furthers." Without objection, this Interrogatory and response were read into and were admitted as part of the record at trial. Tr. 2301-02.

Several days later, TSSAA asserted that its response to Interrogatory 47 was the result of a "clerical error" and sought to supplement its answer to Interrogatory 47. BA timely objected on the ground that TSSAA did not supplement its response in a timely manner under the local rules, which require TSSAA to review discovery responses and correct them before trial. Local Rule 9 provides that answers to interrogatories may be supplemented no later than 30 days before trial. BA had "great difficulty accepting the idea that this is merely a clerical error." During a discovery dispute, TSSAA "had at least three opportunities to go back through their answers and to check to make sure everything was like it ought to be." The answer read into the record was "consistent with the proof" at trial, Tr. 2736, and,

syntactically, it is hard to credit the "clerical error" claim when the answer is as follows: "TSSAA does not contend that the recruiting rule as applied is narrowly tailored ...."

Applying Local Rule 9, the District Court rejected TSSAA's attempt to supplement its answer to Interrogatory 47. It accepted TSSAA's submission as an offer of proof that there was a clerical error, but the record only contains TSSAA's actual answer to Interrogatory 47. Tr. 2738. The evidentiary matter has not been preserved on appeal by TSSAA. Since the record shows TSSAA's acknowledgment that it cannot meet the TPM standard, and the facts (as found by the District Court and affirmed by the Sixth Circuit) are consistent with that acknowledgment, this record provides a questionable vehicle for this Court to review the application of the TPM doctrine to the circumstances of this case.

The Factual Context

In 1995, BA defeated Riverdale, a public high school and traditional football powerhouse located in Murfreesboro, for a football championship. Hulon Watson, Riverdale's principal, acknowledged that he was "quite upset with the loss;" the "Murfreesboro community [was] behind the Riverdale team that year as they pursued the game;" and there was a "big crowd at the game." CAJA 1802-03. A "winning team and a state championship brings a sense of pride to the community and the school that cannot be described." CAJA 1806.

This sense of community pride in winning a statewide athletic championship and its attendant protectionism are recurrent themes. When asked about the purpose of RR, TSSAA Board of Control member Morris Rogers was not subtle. The purpose is "obvious." It is "really for protection of schools and coaches," by "[k]eep[ing] them from losing their best players." CAJA 1628-29.

Jack Roberts of Michigan's TSSAA counterpart asserted that "[t]he sports events of our high schools are a source of pride.... [C]ommunities take a lot of pride in their sports teams," can "develop[] a sense of ownership of these children" (considering them "our kids"), and "can develop resentment" if, "for academic or athletic reasons," students choose to attend an independent school, "[e]specially if they are really good athletes." CAJA 1620-21.

Scott Brunette, Nashville public schools athletic director, and Michael Hammond, TSSAA Board of Control member, testified that public school officials and coaches see students zoned to their schools as "our kids," and "complain about private schools ... beating us with our own kids" or "taking their students." CAJA 1298, 642-43.

Shortly after Riverdale's loss to BA, Watson convened a "split" meeting of about 25 schools for the purpose of proposing "to separate private and public schools ... [a]s far as athletic competition is concerned." CAJA 1803. The deep hurt Watson felt for his school, because of its defeat in a football game, would be remedied by ensuring that Riverdale would not face BA in a championship again.

Watson believed that it was an "injustice" that private schools won more state championships than their percentage of TSSAA membership warranted. CAJA 1812. BA had a "great coaching staff in football," and "good coaches ... can attract higher quality athletes." CAJA 1821.

In convening the "split" meeting, Watson "absolutely" did not notify TSSAA, Carter, or any private schools because he "didn't think they would support it." TSSAA's Legislative Council approved the proposed "split" in modified form. CAJA 1814, 1819-20, 1822-23.

This very divisive "split" episode, which is addressed in BA's antitrust claim, provides context for TSSAA's regulatory enforcement proceeding against BA. When, just months after the "split," a public school official reported alleged recruiting violations against BA, Carter had just been

on the losing side of a major internal TSSAA power struggle. That he had not been invited to the "split" meeting and was unsupportive of the "split" proposal demonstrate his tenuous political standing when BA – the very school whose athletic success had brought about the "split" – was accused (wrongly, as it turned out) of intentionally violating RR by offering free football tickets to unenrolled students.

During its investigation, TSSAA learned that BA had not knowingly or intentionally violated RR. Carter conceded that BA had no intent to violate RR. CAJA 1848, 1830. The parties have so stipulated. CAJA 126 (¶40), 63 (¶91). When the investigation showed no intentional violation, Carter and TSSAA staff were in a political bind. Exonerating BA would be a hard sell to the Watson hard-liners. Thus, despite this information, TSSAA pursued enforcement against BA.

The Recruiting Rule: Its Application and Interpretation

RR prohibits the "use of undue influence on a student …, the parents or guardians of a student by any person connected, or not connected, with the school to secure or to retain a student for athletic purposes." "Undue influence" is defined as "exceeding what is appropriate or normal." 304 F. Supp.2d at 984. The terms "appropriate or normal" are not defined. 13 F. Supp.2d at 686.

The Spring Practice Letter (SPL). TSSAA cleared Ray Marley, a Grassland Middle School student, to lift weights at BA during 1996-97. 304 F. Supp.2d at 997 & n.14. Marley planned to matriculate at BA in fall 1997. Marley wished to attend spring football practice in May 1997, as permitted under TSSAA rules. 442 F.3d at 419 n.2.

"[T]o avoid singling out any students, particularly Ray Marley," BA's football coach Carlton Flatt sent the SPL in April 1997 "to all incoming ninth grade male students who had applied, been tested and admitted, and signed enrollment contracts with [BA]." 304 F. Supp.2d at 989.

One accepted student, who had not signed an enrollment contract, was not sent the SPL. 442 F.3d at 428.

The SPL was informational, setting forth dates for spring football practice and inviting students to attend if interested. The letter was followed by a telephone call to the parents of each student to reaffirm that participation in spring practice was entirely optional. Students who received the letters were entering high school and, therefore, had to change schools upon graduating from middle school.

The District Court found that the SPL and calls "caused no actual harm and did not reasonably threaten harm to students [or] parents" and "simply were harmless informational speech about a permitted athletic practice from a private school to all the parents of all the male students who had already applied, been tested and admitted, and signed enrollment contracts, students who had already decided to attend [BA]." The SPL and calls "did not 'single out' students since they went to all the families of all male students who had completed the enrollment process." 304 F. Supp.2d at 995, 442 F.3d at 428-29 (affirming).

With respect to the SPL and calls, the District Court, applying intermediate scrutiny, held that RR was "not narrowly tailored to further any of the three governmental interests[5] of the TSSAA as applied to Brentwood Academy."

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[5] The interests asserted by TSSAA initially were "(1) to keep high school athletics in their proper place subordinate to academics and (2) to protect student athletes from exploitation." At the second appeal, TSSAA "proffered an additional interest ... fostering a level playing field between the various member schools." 262 F.3d at 557. Governmental regulation of speech must serve a substantial interest that must be "actual," not merely "stated" or otherwise conjured up after the fact. *Edenfield v. Fane*, 507 U.S. 761, 768 (1993). That TSSAA "conceivably could have enacted" its regulatory restriction on speech for a particular reason is insufficient since this Court has not sustained speech restrictions "on the basis of hypothesized justifications." *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 374 (2002). TSSAA has not established that "competitive equity" is an "actual" as distinct from a "stated" purpose, especially since it did not think to defend RR on that

The SPL and calls "are an example of 'due,' rather than 'undue,' influence, as testified by the parents of these students." 304 F. Supp.2d at 995. The Court of Appeals affirmed. 442 F.3d at 428.[6]

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ground at summary judgment in the District Court or in the first appeal. Under the circumstances, this Court "need not pursue that inquiry." *Republican Party v. White*, 536 U.S. 765, 778 (2002).

[6] There is a fundamental difference between the "additional interest" TSSAA now asserts – competitive equity – and its other two interests. As applied to speech restriction, competitive equity shifts the focus from the student's interest, which is the unit of analysis under the "exploitation" and "subordination" theories, to the collective interest of the schools in the association, CAJA 1685-86, thereby necessarily subordinating the interest of the student to that of the association (and, to some degree, commodifying the students themselves). *See* Factual Context, *supra*. This places the educational interests of the students in substantial tension with the interests of the association. It treats students as objects, as "mere creature[s] of the state," which *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925), condemns. Such an approach turns the role of government – facilitating educational opportunities for youth – on its head, and disrespects the primacy of student/family choice. Addressing that tension, the District Court held that the "substantial government interest in informed choice trumps any governmental interest in controlling which schools or teams win athletic contests" because "[a]cademics are more important than athletics." 304 F. Supp.2d at 994. Since TSSAA asserts an interest in subordinating athletics to academics, it is hard-pressed analytically to take issue with that holding. The Court of Appeals agreed, holding that competitive equity is not a "substantial" governmental interest justifying a restraint on speech. 442 F.3d at 426-27. Non-threatening and non-coercive school-initiated, targeted communication with non-matriculated students "may influence the outcome" of a student's decision whether or not to attend a particular school. "[T]his would be its purpose." But TSSAA may not "restrict the speech of some [members] in order to enhance the relative voice of others." That is "wholly foreign to the First Amendment." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 790-91 (1978). As the District Court stated at summary judgment, "TSSAA does not have a legitimate interest in preventing a school, public, private or parochial, from providing information in an effort to persuade potential students that the educational experience at that school is superior to that to be gained at another school." That is, "it is simply not the business of the State to

Summary Judgment Stage. Considerable interpretive commentary follows RR. 304 F. Supp.2d at 984-86. At summary judgment, violation of the commentary seemed to be a *per se* violation of RR. 13 F. Supp.2d at 686. Punishment of BA seemed unrelated to the content of its communications with students and parents and, according to TSSAA, was defensible under TPM theory because not content-based. *Id.* at 687-88.

In 2001, the Sixth Circuit accepted those assertions; as defined by the commentary, RR "prohibit[s] the coaches and those acting on their behalf from initiating the contact" with "prospective students." 262 F.3d at 553, 557. Based on the summary judgment record, it concluded that RR, "as defined by the questions, answers, and guidelines contained within the TSSAA Bylaws," *id.* at 552, was "regulatory action," *id.* at 558, addressing "secondary effects" unrelated to the content of the speech, *id.* at 553, and did not "ban[] the substantive content of any particular message." *Id.* at 552. Accordingly, that court held that the RR regulated the "manner" in which schools can communicate about their athletic programs, *id.*, and applied the intermediate scrutiny standard applicable to TPM regulations. *Id.* at 553-54.

BA sought review in this Court. No. 01-1117. TSSAA described the SPL as a form of "recruiting conduct" proscribable "regardless of the specific content of the message it uses to solicit minors" and sanctionable "[r]egardless of the specific content of any recruiter's message," or its "persuasive effect." BIO 13-14, 17. TSSAA characterized its enforcement of RR as "[s]tate regulation," which is "triggered by the event rather than the content of any speech during the event." TSSAA contended

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stifle competition among schools for students, whether those students are athletes, musical prodigies, or math geniuses. In the competition among schools for students, the First Amendment prohibits the State from favoring one side ... by suppressing the speech of the other .... TSSAA cannot control school choice through censorship." 13 F. Supp.2d at 689.

that its RR "must ... be viewed as a reasonable restriction on the time and manner of [BA's] solicitation of minors." BIO 15.

Trial Stage. At trial, TSSAA disavowed a content-neutral interpretation of the interpretive commentary as creating and defining a series of specific *per se* RR violations. TSSAA did not identify "secondary effects" unrelated to the content of speech toward which the regulation of speech was aimed. The District Court found this as a fact. 304 F. Supp.2d at 996 n.12.

The evidence at trial demonstrated that, in administering RR, TSSAA focused, on a case-by-case basis, on the content of the communication in determining whether it constituted "undue influence." TSSAA acknowledged that the content of the punished speech and its impact on the recipients of the SPL and calls were critical ingredients underlying TSSAA's discipline of BA. The District Court found: "[T]he preponderance of the credible evidence at trial is that the substantive 'content' of the [SPL] and calls mattered and was a significant factor in the TSSAA's decision that the letter and calls constituted 'undue influence' and violated the Recruiting Rule." *Id.* at 991 n.4; *see also id.* at 996 n.12 ("[T]he application of the Recruiting Rule to [BA] in this case is with reference to the content of the speech and the impact of the speech").[7]

The interpretive commentary is not a set of content-neutral *per se* rules but constitutes guidelines that Carter and TSSAA have discretion to disregard in applying RR's "undue influence" standard. CAJA 740, 817, 846-55, 1009-10. Analysis under RR is a standardless, *ad hoc* totality-of-

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[7] At trial, TSSAA distinguished, based on content, the SPL and a comparable "Warrior" letter from another coach at another school (Riverdale). TSSAA deemed the SPL "undue influence" but not the Warrior letter. *Id.* at 991; CAJA 814-25. See Appendix A.

the-circumstances approach.[8] CAJA 1702, 817. There are "not violations of questions" but only of the "undue influence" standard of RR; determination of a violation requires Carter to "put that all into the context of what has occurred," CAJA 851, to "determine whether all the factors that are there" constitute "undue influence." CAJA 849.

Carter stated that "[w]e don't have an initial contact rule," CAJA 740, and "[w]e don't have a no coach contact rule." CAJA 850. Initial contact by a coach is not a violation; to determine what violates RR, even in the face of initial contact, "you would have to take all of the whole thing into what's turning around, what's taking place. You got to take all the information and put it together ...." CAJA 848.

Carter distinguished the considerable discretion he exercised under RR from his non-discretionary role in interpreting other rules. CAJA 855. For the RR, the commentary is not binding. "[T]he questions and answers [*i.e.*, the interpretive commentary] don't matter ..., it's not the rule." The RR itself "is all that really counts, everything else underneath it, the interpretive commentary is discretionary and it depends upon the totality-of-circumstances." CAJA 1009-10, 1115, 1069; Tr. 1053.

The District Court found that "[i]nclusion of the interpretive commentary does not save the Recruiting Rule;"

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[8] According to TSSAA, member schools should "[p]ick up the telephone and call" Mr. Carter for a non-binding interpretation of whether particular speech is permitted under the "undue influence" rule. CAJA 861, 810, 1069. Such standardless discretion is routinely invalidated in First Amendment cases. A "regulatory program aimed at the prevention of undue influence" risks the "danger of censorship through selective enforcement of broad prohibitions." *In re Primus*, 436 U.S. 412, 432 (1978). Adequate standards are necessary in the First Amendment context for "effective judicial review" of government's regulatory conduct. *Thomas v. Chicago Park Dist.*, 535 U.S. 316, 323 (2002). *See Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133 & n.10 (1992); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 554 & n.7 (1975); *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151-53 (1969).

the "interpretive commentary to the Recruiting Rule is not a binding interpretation of the Recruiting Rule, and ... the Executive Director and the Board of Control have the discretion to disregard the interpretive commentary," and they "have done so." 304 F. Supp.2d at 986, 992, 995 & n.8. The Court of Appeals affirmed this finding. 442 F.3d at 416-17, 428. In sum, "TSSAA penalized [BA] for the substantive 'content' of the [SPL] and calls and the message conveyed." 304 F. Supp.2d at 991 n.4.

With its TPM defense in analytical tatters on all fronts, TSSAA has redirected the analytical focus – away from the content-neutral vs. content-based issue within a regulatory framework – to the claim that, contrary to its earlier contention, the regulatory framework and the attendant TPM analysis do not apply at all.

REASONS FOR DENYING CERTIORARI

The Petition reads like a game of pin-the-tail-on-the-constitutional-donkey, blindly trying to find some doctrine somewhere whose standards TSSAA can possibly meet, even if there is no real applicability to the circumstances.

TSSAA has never been able to explain why it disciplined BA for a harmless communication to non-matriculated students and their parents about an activity – spring football practice – that the rules allowed the students to attend. Mr. Carter had concerns about the number of students participating in spring practice, believing the spring practice rule had "outlived its purpose." CAJA 703. In earlier years, only one or two students had participated at BA. After the SPL, twelve students participated. CAJA 1844. Faced with a situation of which he disapproved, but which was permissible under existing rules, Carter punished the speech that resulted in the disapproved but legal outcome – the increased spring practice participation. Regulatory conduct barring speech about legal conduct so clearly

violates core First Amendment principles that the federal government has declined to enforce or defend such restrictions. *New York Bar Ass'n v. Reno*, 999 F. Supp. 710 (N.D.N.Y. 1998).

To the extent that allowing non-matriculated students to participate in spring practice is educationally unsound, TSSAA had – and has now exercised (442 F.3d at 419 n.2) – the authority to ban the conduct. Incoming, but not-yet-matriculated, students may no longer participate in spring practice. CAJA 703. Thus, the problem that precipitated this proceeding will not recur. That is the appropriate resolution, not punishing speech that invites participation in the activity. One might think that, having changed the policy, TSSAA would no longer pursue the matter. No broad forward-looking injunction has been issued, 442 F.3d at 428 n.11, 443-44, only case-specific retrospective relief – critical vindication for BA but of less import to TSSAA. Instead, TSSAA has fought a scorched-earth battle to suppress BA's harmless speech that informed students of an authorized athletic opportunity. As the District Court held, TSSAA has applied RR to "what is essentially post-recruiting activity," which is "especially troublesome." 304 F. Supp.2d at 996.

TSSAA'S CHALLENGED ACTION WAS REGULATORY

The State-Action Holding. TSSAA's Constitution states as its purpose "to stimulate and regulate athletic relations of the secondary schools of Tennessee." 13 F. Supp.2d at 679. This Court addressed the following issue in 2001: "[W]hether a statewide association incorporated to regulate interscholastic athletic competition among public and private secondary schools may be regarded as engaging in state action when it enforces a rule against a member school," a "private parochial high school." 531 U.S. at 290, 293. The Court's answer: "[T]he association's regulatory activity ... should be treated as state action." *Id.* at 291. It

was this regulatory function, exercised "in lieu of the State Board of Education's exercise of its own authority," *id.*, that made TSSAA a state actor. TSSAA had been designated and recognized as the state's "regulator" of interscholastic athletics. *Id.* at 292-93. TSSAA's conduct would not be state action if it were merely providing services. *Id.* at 299.

This Court understood TSSAA to be acting in a regulatory capacity in enforcing RR against BA and sanctioning BA for a putative violation. It noted that this case "responds to a 1997 regulatory enforcement proceeding brought against [BA], a private parochial high school member of [TSSAA]." *Id.* at 293.

TSSAA's regulatory conduct vis-à-vis BA is subject to conventional First Amendment scrutiny of governmental regulatory conduct. *See Marsh v. Alabama*, 326 U.S. 501, 503-05, 507 (1946) (holding conventional First Amendment principles from licensing cases applied to solicitation in company-owned town (a state actor)); *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 320 (1968) (First Amendment protections co-extensive with those of municipalities apply to shopping center) (state action holding overruled, *Hudgens v. NLRB*, 424 U.S. 507 (1976)).

First Amendment Analysis. In the Sixth Circuit, TSSAA asserted that conventional First Amendment analysis "appl[ies] only to a state's exercise of sovereign police power over an unwilling citizen." TSSAA Response Brief at 5. Its Petition repeats this assertion. As the Sixth Circuit held, the cases do not sustain it. 442 F.3d at 422-24. Rather, conventional First Amendment principles apply to TSSAA's regulatory conduct.

To qualify as "regulation," governmental suppression of speech need not stem from sovereign status. It can come from informal activities amounting to "informal censorship." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 69 (1963). In *Bantam Books*, a state Commission had no prosecutorial

authority, only authority "to educate the public concerning any book" tending to "corrupt[] ... youth," *Id.* at 59, 61-62.

This Court noted the importance of procedures to protect speech against curtailment and the absence of such procedures surrounding the Commission. The Commission argued that conventional First Amendment principles did not apply because the Commission did "not regulate or suppress" speech but "simply exhorts" and advises booksellers. That contention was "premised on the Commission's want of power to apply formal legal sanctions." That is, the Commission asserted that it was not exercising sovereign power to suppress speech.

This Court found that position "untenable." *Id.* at 66. The Commission's conduct, a form of blacklisting, in effect stopped the circulation of publications and was designed to achieve that goal. The Commission's conduct was "a form of regulation that creates hazards to protected freedoms." The procedures fell "far short of the constitutional requirements of governmental regulation." *Id.* at 70, 71. That the Commission exercised no formal sovereign functions was immaterial.

Similarly, in *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), this Court applied conventional regulatory doctrine regarding "public forums" to proprietary operation of a municipal theatre. The question was whether a city could refuse to lease a city-operated theatre for showing "Hair."

Conrad applied First Amendment principles from the licensing cases to the city's decision not to contract with "Hair" in the municipally-operated theatre. The city's decision not to contract was "indistinguishable in its censoring effect from the official actions" in the licensing cases. "[R]estraints" on speech take a "variety of forms." *Id.* at 552. The critical First Amendment issue is the power of government officials to restrain speech, whether through exercise of sovereign or proprietary (contractual) authority.

The contract was "in effect, a license or a permit" with approval based on the "exercise of judgment." *Id.* at 554 & n.7. *Conrad* accordingly applied conventional First Amendment "prior restraint" doctrine, although derived from cases involving restraints "embedded in the licensing system itself." *Id.* at 553. The contractual form and its non-sovereign source did not save the restraint from being considered a "prior restraint" on speech subject to First Amendment principles applicable to sovereignty-based licensing cases, *id.* at 555; the "elements of prior restraint identified in [the licensing cases] were clearly present in the system by which the Chattanooga board regulated the use of its theatres." *Id.* at 554. The existence of excessive discretion by public officials in contracting triggered the same procedural requirements as in sovereignty-based licensing. *Id.* at 554 & n.7; *accord*, *Forsyth County*, 505 U.S. at 131; *Thomas*, 535 U.S. at 321; 442 F.3d at 423-24.

Ibanez v. Florida Bd. of Accountancy, 512 U.S. 136 (1994), also demonstrates the non-existence of TSSAA's asserted doctrinal principle. Ibanez practiced law and also was a licensed Certified Public Accountant (CPA). She could perform accounting functions without a license. *Id.* at 140 n.6. With one exception, "activities performed by CPAs can lawfully be performed by non-CPAs." *Id.* at 139 n.3.

Ibanez voluntarily subjected herself to the Board of Accountancy, which disciplined her for using CPA and CFP (Certified Financial Planner) designations. Since Ibanez did not need approval to practice law or accounting, the Board had no sovereign authority over her. It exercised a credentialing or certification function, but had no authority to require Ibanez to stop practicing accounting – only to stop using certain designations.

Although the Board exercised non-sovereign certification authority, this Court applied traditional commercial speech doctrine from the licensing cases. Ibanez voluntarily submitted to the Board's regulatory jurisdiction

to receive its imprimatur; BA voluntarily submits to TSSAA's regulatory authority to participate effectively in organized interscholastic athletics. Just as the full panoply of commercial speech protections applied in *Ibanez* to a disciplinary proceeding in the non-sovereign regulatory context, so does the full panoply of non-commercial speech protections apply to TSSAA's regulatory disciplinary proceeding against BA.

In *Board of Regents v. Southworth*, 529 U.S. 217 (2000), the question was whether a public university may require its students to pay an activity fee that supports extracurricular speech. Students voluntarily (contractually) enroll in a public university; nevertheless, the Court applied conventional First Amendment principles to assure that a standardless referendum procedure did not undermine traditional First Amendment protections – that "[a]ccess to a public forum ... not depend upon majoritarian consent." The issue was the university's treatment of registered student organizations, a contractual setting; yet, traditional First Amendment principles were "controlling here." *Id.* at 235.

In *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 834-35 (1995), a public university's regulation authorized payment for printing costs of student publications. The regulation withheld payment from plaintiffs because their student paper promoted belief "about a deity." The relationship between the university and its students was contractual, yet this Court described the guideline as a regulation, expressing concern that it "effects a sweeping restriction on student thought and student inquiry." "Vital First Amendment speech principles" were at stake, including giving government broad discretionary authority to classify speech based on content. *Id.* at 835. The Court invalidated the regulation, applying conventional First Amendment principles; the contractual, non-sovereign status of the university's authority was immaterial, since "[v]ital First Amendment speech principles" can arise irrespective of

the formal nature of authority exercised. *See Legal Services Corp. v. Velazquez*, 531 U.S. 533, 547 (2001) (statutory restriction implemented by contract considered regulatory restriction on speech and analyzed as such, "lest the First Amendment be reduced to a simple semantic exercise").

In *Widmar v. Vincent*, 454 U.S. 263 (1981), the question was whether a state university, which made its facilities generally available to registered student groups, may close its facilities to a registered student group desiring to use the facilities for religious worship and discussion. The "pertinent regulations" prohibited use of university facilities for religious worship or teaching. *Id.* at 264-65 & n.3.

The regulation was a content-based exclusion of speech that had to satisfy strict scrutiny, "the standard of review appropriate to content-based exclusions." *Id.* at 270 & n.7. The university's authority stemmed from its ownership of facilities, not "sovereign" power. Its relationship with students was contractual. The regulation did not involve the use of "sovereign police power over an unwilling citizen." Students voluntarily subjected themselves to the authority (and benefits) of the university via enrollment contracts; the university's content-based restriction of speech in the allocation of university facilities was subjected to the generally applicable "standard of review appropriate to content-based exclusions." *Id.* at 270. The university could impose TPM restrictions, subject to generally applicable TPM standards. *Id.* at 276. But when a public university adopts content-based regulations of speech affecting its students, it must justify those restrictions "under applicable constitutional standards" for content-based regulation of speech.

In *Keller v. State Bar*, 496 U.S. 1, 4, 13-14 (1990), state law compelled lawyers to join and pay dues to an integrated bar. In *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1976), a collective bargaining contract mandated payment of union dues by public employees. This Court

upheld both mandatory payments but held the bar could only spend mandated dues on matters germane to regulation of the legal profession, and the union could only spend mandated dues on matters germane to collective bargaining. Contributions compelled by government for political purposes infringe First Amendment rights, whether compulsion derives from positive law (*Keller*) or contract (*Abood*). The First Amendment principles are identical. *See First Nat'l Bank*, 435 U.S. at 795 (compelled financial support of political activity violates First Amendment whether by "state law" or by union contract); *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 302 n.9 (1986).

In sum, there is no basis for TSSAA's claim that, in the regulatory context, First Amendment protections are limited to matters of "public concern." Such a rule would give unprecedented and far-reaching censorious authority to government as regulator. Indeed, a core First Amendment principle is that private speakers get to choose their topic, and government regulation of the speaker's topic is subject to searching scrutiny. *First Nat'l Bank*, 435 U.S. at 785 (government may not dictate "the subjects about which persons may speak").

The entire "contract" discussion is smoke and mirrors, more akin to the jurisprudence of Houdini than that of Holmes.[9] A party can knowingly and intentionally waive a constitutional right, but no waiver exists here (442 F.3d at 424-25; pages 2-3, *supra*);[10] and, if that were the argument,

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[9] *Cf. First Nat'l Bank*, 435 U.S. at 778 n.14 (rejecting analogous claim that, as "creatures of the state," corporations "have only those rights granted to them" and that states "are free to define the rights of their creatures without constitutional limit," characterizing such claims as "an extreme position" because it would allow states to deny corporations "the protection of all constitutional guarantees").

[10] The waiver argument also overlooks the critical interests of the recipients of BA's communication. *Id.* at 776, 791 n.31 (First Amendment "protects interests broader than those of the party seeking

the existence of waiver in a particular case is case-specific and hardly certworthy. As the foregoing cases establish, merely agreeing to subject oneself to government's non-sovereign regulatory authority does not constitute waiver.[11] This emperor has no clothes. 442 F.3d at 421-24.[12]

THE TIME, PLACE, AND MANNER DEFENSE

Conventional First Amendment analysis allows for defense of an incidental restraint on speech based on TPM. In remanding for trial, the Sixth Circuit gave TSSAA an opportunity to defend its punishment of BA's non-commercial speech on a TPM theory. The burden of

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their vindication" and "rejects the 'highly paternalistic' approach of ... restrict[ing] what the people may hear"). 13 F. Supp.2d at 690 n.19.

[11] *Cf. Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 456-57 (1988) (rejecting claim that a party is forbidden to challenge government action because it "deriv[es] some benefit from it").

[12] There is no reason to vacate and remand in light of *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006), or *Rumsfeld v. FAIR*, 126 S. Ct. 1297 (2006). Pet. 20. This case has been to the Sixth Circuit three times already and has been ongoing since 1997. TSSAA has had its chance to prevail over and over; it has embraced and then disavowed both facts and theory. Vacating and remanding would add expense and needlessly prolong resolution and to no gain. *Garcetti* deals with First Amendment protection of employees, not restraints on speech involving government as regulator. Unlike the proceeding herein, in which speech is punished, *Rumsfeld* did not deal with "law schools' right to speak," 126 S.Ct. at 1311, but with speech "plainly incidental to the ... regulation of conduct," *id.* at 1308, and to expressive conduct that is "not inherently expressive." *Id.* at 1310. Further, *Rumsfeld* analyzed the issues under traditional First Amendment doctrine, breaking no new ground. *Id.* at 1307. The Sixth Circuit released its decision 16 months after oral argument, after *Rumsfeld* was decided. The panel almost surely was aware of *Rumsfeld* and properly concluded that its analysis was not relevant to the very different First Amendment issues presented herein. Gratuitously vacating and remanding is not useful and is potentially wasteful.

justification rested with TSSAA. 262 F.3d at 554. TSSAA was unable to establish the elements of a TPM defense.[13]

TSSAA had an opportunity to justify, under TPM doctrine, its restraint on speech in the context of what this Court has described as TSSAA's "regulatory enforcement proceeding" against BA. 531 U.S. at 293. The Sixth Circuit found two interests to be "substantial" – subordination of athletics to academics and exploitation. The asserted interest in competitive equity was not deemed substantial. See note 6, *supra*. Since TSSAA's regulatory enforcement was not narrowly tailored to any substantial interest, its TPM defense failed. Because of the terms of the 2001 decision to remand, neither the District Court at trial nor the Sixth Circuit found it necessary to address or rely on the other TPM elements. But, based on the evidence, the District Court did find that TSSAA's regulatory action was neither content-neutral nor focused on "secondary effects." 304 F. Supp.2d at 991 n.4, 996 n.12. And the Sixth Circuit found "that the interpretive commentary is discretionary" and enforcement of RR depends on the standardless "totality of the circumstances." 442 F.3d at 416-17. So, lack of narrow tailoring did not stand alone; other elements of a TPM defense are lacking.

When the RR infringes on speech, the First Amendment requires TSSAA to implement a "process" that provides for a "careful calculation of the speech interests involved." Even when regulating other things, government must consider the impact of the regulation on speech. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 562 (2001). That did not occur in the adoption or enforcement of RR.

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[13] To prevail, TSSAA had to satisfy five elements: (i) the regulation must serve a "significant" (or "substantial") governmental interest; (ii) the regulation is narrowly tailored to achieve that interest; (iii) TSSAA must have "adequate standards to guide [TSSAA's] decision and render it subject to effective judicial review;" (iv) the regulatory scheme "must not be based on the content of the message;" and (v) permissible regulation of the secondary effect of speech "must leave open ample alternatives for communication." *Thomas*, 534 U.S. at 323 & n.3.

At trial, it became evident that TSSAA has never recognized the special solicitude accorded to governmental regulation of First-Amendment-protected speech. *See* note 3, *supra*. TSSAA and its witnesses saw speech and conduct as indistinguishable for purposes of the exercise of TSSAA's regulatory authority. TSSAA gave no consideration to RR's application to First-Amendment-protected speech or to non-speech alternatives. Mr. Carter admitted that TSSAA had not "at any time in the last ten years ever considered alternatives to restricting speech in looking at the recruiting rule" and had "given no consideration whatsoever to how can we tailor the recruiting rule to meet the requirements of the First Amendment." CAJA 1016-18.

In sum, government's ability to restrict speech is more circumscribed than its ability to regulate conduct. *Hurley*, 515 U.S. at 579. The speech punished in this case is non-commercial in character, 262 F.3d at 555; TSSAA's Petition does not contest that. Even if, as TSSAA asserts, BA's speech were solicitation, government cannot discipline non-commercial solicitation "without proof of actual wrongdoing that the State constitutionally may proscribe." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 462 n.20 (1978). In *Primus*, which involved discipline for "undue influence" in the context of non-commercial speech, the Court found that no "undue influence, overreaching, misrepresentation, or invasion of privacy actually occurred." 436 U.S. at 434-35. The Court analyzed the specific context and the specific speech in question to conclude that, in the absence of harm, government could not "justify proscription of the activity of appellant." *Id.* at 436.

The findings in this case are similar; the lower courts have found the SPL and calls to be informative, not harmful, with no indication of exploitation "in theory or fact." 442 F.3d at 428. TSSAA applies the "undue influence" RR principle on an *ad hoc*, case-by-case basis – in this case to pure speech, not expressive conduct. As the facts have

developed, RR does not contemplate a broad prophylactic or categorical rule prohibiting all school-initiated, targeted contact. So, TSSAA's assertion that the rule should be viewed in the abstract, not as applied in specific situations (Pet. 18), rings peculiarly hollow.[14] Since there is no "coach contact" or "initial contact" *per se* categorical rule, but only an *ad hoc* case-specific "undue influence" rule applied to specific speech or conduct, TSSAA's claim that the specific application of the rule need not be justified is unwarranted. Since there is no categorical rule, there is no way to evaluate the application of the rule except by examining its application in specific cases and contexts. *Primus* makes this clear. Otherwise, government would be handed a blank check to restrict speech, without effective judicial review.[15]

Even a categorical rule must be justified in an as-applied TPM context by reference to the specifics of the circumstances. In upholding a ban on posting signs on public property, this Court distinguished a case that invalidated a ban on handbilling; the sign posting ban dealt directly with the "substantive evil – visual blight" that is "created by the medium of expression itself" and thereby "responds precisely to the substantive problem" and "curtails no more speech than is necessary to accomplish its purpose." That is, the signs themselves "constitute[d] visual clutter and blight," and the ban "did no more than eliminate the exact source of the evil it sought to remedy." *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 808-10

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[14] TSSAA's cases (Pet. 19) involve the application of categorical rules. The "undue influence" standard is inherently *ad hoc*, applied case by case. Further, a TPM defense cannot be established here because the undue influence standard turns on the content of the communication and its impact on the listener. 304 F. Supp.2d at 991 & n.4, 996 n.12.

[15] Even a broad prophylactic "undue influence" rule against "all solicitation" cannot apply to non-commercial speech, where "a State must regulate with significantly greater precision." *Primus*, 436 U.S. at 437-38.

(1984). This is not true of this case, since, as the District Court found, the punished speech is "consistent with ... the TSSAA's legitimate governmental interests," "caused no actual harm and did not reasonably threaten harm to students, parents, or any legitimate governmental interests," and was "not intrinsically coercive, threatening, harassing, or otherwise harmful." 304 F. Supp.2d at 995-97.

As a general matter, then, "if the Government could achieve its interest in a manner that does not restrict speech, or that restricts less speech, the Government must do so.... [R]egulating speech must be a last – not first – resort." *Thompson*, 535 U.S. at 373. But speech restriction is the only resort TSSAA has checked into.

OTHER MATTERS

No Circuit Split Exists. TSSAA asserts that a split in circuits exists on the issues raised in this matter. This is incorrect. TSSAA's cases either involve express, negotiated fact-specific waivers or non-regulatory conduct. None of the cases allegedly establishing a circuit split involves a claim that regulatory conduct of a governmental entity receives special First Amendment non-scrutiny. Pet. 20-22. BA is aware of only one court of appeals case to have confronted the First Amendment issue raised herein, and that decision did not create a conflict. *Holy Cross College, Inc. v. LHSAA*, 632 F.2d 1287 (5th Cir. 1980). *Holy Cross* involved a First Amendment challenge to application of the "undue influence" standard in the context of a high school athletic association's RR. The Fifth Circuit declined to dismiss since the allegations "implicate[d] the fundamental right of free speech guaranteed by the first amendment." *Id.* at 1289.[16]

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[16] There is one district court case that, as an alternative analysis, would apply TSSAA's approach to a high school athletic association's RR. *Rottmann v. PIAA*, 349 F. Supp.2d 922 (W.D. Pa. 2004).

This Court Should Not Revisit State Action. TSSAA throws a Hail Mary pass, inviting this Court to relieve it of its obligations as a state actor. The Court should RSVP no.

TSSAA asserts (Pet. 27) that this Court did not take into account the "particular state *action*" involved, only TSSAA's status. This is erroneous, bordering on silly. It is the regulatory function that TSSAA performs, entwined with government, that resulted in its being found a state actor. This Court found TSSAA a "surrogate association" designated and recognized by the state as "regulator of interscholastic athletics." 531 U.S. at 292-93, 300. If only a service provider – "a mere buyer[] of contract services" – TSSAA would not be a state actor. *Id.* at 299. TSSAA willfully ignores the critical regulatory function it performs, "regulat[ing] in lieu of the State Board of Education's exercise of its own authority." This Court held that TSSAA's "regulatory activity" constituted state action. *Id.* at 291. The Sixth Circuit had no trouble recognizing the analytical significance of the regulatory character of TSSAA's conduct for purposes of the First Amendment analysis in this case.

Agostini v. Felton, 521 U.S. 203 (1997), is not on point. *Agostini* overturned a prior decision by this Court in the very same case because the original decision was "no longer good law" in light of this Court's "subsequent ... decisions." *Id.* at 208-09. The earlier decision had resulted in a "prospective injunction" that still barred New York City from sending public school teachers into parochial schools to provide remedial education to disadvantaged children. In *Agostini*, this Court permitted relief from the ongoing effect of the prospective injunction under FRCP 60(b)(5).

No subsequent decision of this Court calls into question its holding in this case. No prospective injunction was entered by the Sixth Circuit, 442 F.3d at 428 n.11, 444. TSSAA has not followed the procedure mapped out in Rule 60(b), as was done in *Agostini*, and indeed does not even

mention Rule 60(b). The lack of prospective relief in this case makes *Agostini*'s rationale and procedure inapplicable. 521 U.S. at 237-40. The unusual *Agostini* procedure is only appropriate to "*recogniz[e]* changes in law" not "as a vehicle for *effecting* them" (*id.* at 238) – what TSSAA seeks.[17]

Since no subsequent change of law has taken place and no prospective injunction analogous to *Agostini* exists, one is left to the natural inference that TSSAA is appealing to the two newly appointed Justices to reconsider a recent precedent in the context of that very case. The cautionary comment of Justice Stewart in this regard is worth repeating. He expressed "a word of concern" about overruling recent precedent when the "only perceivable change that has occurred" since the recent precedent at issue was "in the makeup of this Court." A "basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve." *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 634-36 (1974) (dissent). This Court should credit Justice Stewart's words of caution by not revisiting its state action analysis.

Procedural Due Process. TSSAA half-heartedly seeks review on the procedural due process issue but in its Petition only succeeds in explaining why the case reflects a particular application of fairly plain-vanilla doctrine.

The District Court found that allegations surrounding Bart King had been discussed and relied on by TSSAA in its *ex parte* deliberations about sanctioning BA, that BA had no opportunity to respond to this evidence, and that BA had been "misled" by TSSAA about the relevance of these

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[17] *Agostini* distinguished a change in law that has already occurred from the "views of five Justices that the case should be reconsidered or overruled," which "cannot be said to have effected a change" in the law warranting overruling a decision in the same case. *Id.* at 217-18.

allegations. 304 F. Supp.2d at 1004 & n.29. The Sixth Circuit upheld these factual findings. 442 F.3d at 436. TSSAA cavalierly avers that the "district court wrongly credited a statement that TSSAA considered *ex parte* evidence of recruiting violations" by Bart King. Pet. 26. So, TSSAA seeks review of fact-finding error. Hardly certworthy, even if the evidentiary issues had been preserved.

On the law, the Sixth Circuit's decision breaks no new doctrinal ground. It held that "a school must be informed of all the issues relied on by an athletic association levying penalties against the school and be given a chance to respond to those issues before penalties are imposed." Due process assured BA "notice of the evidence relied upon" in penalizing it and an opportunity to respond timely to that evidence. 442 F.3d at 437-38.[18] TSSAA procedures provided no assurance that its decision would be based on the "evidence adduced at the hearing." *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970). The result implicated venerable principles regarding the importance of an opportunity to cross-examine. *See id.* at 269 ("In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses"); *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (PDP requires party challenging his detainee status to receive "notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions"); 442 F.3d at 434, 436-37.

CONCLUSION

For the foregoing reasons, TSSAA's petition for certiorari should be denied.

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[18] The Sixth Circuit rejected BA's claim that it had a right to a neutral, impartial decisionmaker. 442 F.3d at 434.

Respectfully submitted,

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APPENDIX

BRENTWOOD ACADEMY
219 Granny White Pike
Brentwood, Tennessee 37027
(615) 377-3632
fax: (615) 377-3709

Athletic Director: Carlton Flatt
Asst. Athletic Director: Buddy Alexander

April 23, 1997

Having officially enrolled at Brentwood Academy, the TSSAA allows you to participate in spring football practice. If you are not currently involved in a sport at your school, we would like to invite you to practice with your new team. Equipment will be given out April 30th at 3:30 downstairs in the locker room.

Spring practice will begin May 1, 1997 and conclude on May 14, 1997. Practice begins at 3:20 and will be finished by 4:45. Due to the inconvenience to your parents, please do not feel that you must attend every practice. However, I do feel that getting involved as soon as possible would definitely be to your advantage.

In the near future, you will receive a letter outlining our summer workout program. If you have any questions, please call me at school 373-0611 x 119, or at home 373-0475. We are certainly glad that you decided to become an ***Eagle***.

Your Coach,
Carlton Flatt

July 6, 1995

WARRIOR!

I would like to take this opportunity to **WELCOME** you to the 1995 Riverdale Warrior football team.

We are looking forward to the upcoming season with great enthusiasm and high expectations. Our opening game with Smyrna is a little over eight weeks away and we must be totally committed to the task ahead of us.

The Riverdale High School motto is "A COMMITMENT TO EXCELLENCE" and that is what we will strive for this season. With your commitment and dedication we will achieve our goal of being the "1995 REGION 4AAAAA CHAMPIONS" – on the way to "STATE CHAMPIONS".

On Monday, July 24th, Dr. O. Tom Johns and staff will physicals, free of charge, from 5:00 p.m. to 8:00 p.m. at Riverdale. Please complete the enclosed form and bring it with you on the day of the physicals. Report directly to the Riverdale High School football locker room.

ALL players will report to practice on Tuesday, July 25, 1995 at 4:00-8:00 p.m.

SEE YOU SOON!

Coach Gary Rankin

1. **Monday, July 24, 1995 physicals 5:00 p.m. – 8:00 p.m.**

Supreme Court, U.S.
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(2)

No. 06-427

In the Supreme Court of the United States

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION,
PETITIONER,

v.

BRENTWOOD ACADEMY,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Most of Brentwood's opposition is consumed by misleading and irrelevant factual diversions. On the law, the opposition makes clear why review is necessary. Brentwood freely concedes that its position, and that of the Sixth Circuit, is that there is *absolutely no difference* for First Amendment purposes between a voluntary athletic league enforcing its agreed-upon rules of competition, and the state enforcing speech restrictions against any non-consenting member of the public under its general police powers. Brentwood completely ignores this Court's cases, cited in the petition, establishing that participants in voluntary government programs frequently must accept some limits on their speech within the context of the program. Instead it cites a litany of irrelevant public forum cases, and unconstitutional conditions cases that support TSSAA's position. Brentwood also forthrightly agrees with the Sixth Circuit that a desire to promote competitive equity can never justify limits on the recruiting "speech" of participants in high school athletics. And it agrees with the Sixth Circuit that federal courts should second-guess the judgment of athletic associations about whether a generally justified rule should be enforced in particular circumstances.

As the briefs of amici make clear, the Sixth Circuit's reasoning here is inconsistent with the consensus judgment of educators all over the country that recruiting of students for athletic purposes undermines the educational goals of high school athletics. It conflicts with decisions of this Court and other courts of appeals, and merits review.

1. Brentwood attempts to manufacture a vehicle problem by mischaracterizing the record and course of proceedings. Its arguments are completely without merit.

First, TSSAA has not changed its position, and the Sixth Circuit certainly did not "accept[] TSSAA's analytical framework" by applying intermediate scrutiny. Opp. 5. TSSAA argued from the very beginning of this case that Brentwood's First Amendment claim must be rejected

because TSSAA is a voluntary association and its authority over Brentwood is purely contractual in nature. TSSAA's Sixth Circuit brief on the first appeal argued that Brentwood's First Amendment claim fails "[e]ven if TSSAA is a 'state actor'" because Brentwood's "relationship with TSSAA is a purely voluntary and contractual relationship." Br. of TSSAA at 36, No. 98-6113 (6th Cir. Dec. 10, 1998). TSSAA cited this Court's decisions in *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), *Connick v. Myers*, 461 U.S. 138 (1983), and *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668 (1996), and argued that Brentwood's speech was not on a matter of public concern, *id.* at 37-40, defending itself under "time, place, and manner" standards in its reply brief only as a backup argument. Reply Br. of TSSAA at 23-24 (6th Cir. Dec. 12, 1998). On remand from this Court, TSSAA defended itself under the framework imposed by the Sixth Circuit, but also again stressed the voluntary nature of the relationship, citing one of the cases now relied upon to illustrate the circuit split. Suppl. TSSAA Br. at 4-5, 12-13, (6th Cir. June 8, 2001), *citing Lake James Cmty. Volunteer Fire Dep't v. Burke County*, 149 F.3d 277 (4th Cir. 1998). TSSAA also again argued, citing *Pickering* and *Umbehr*, that Brentwood loses because its speech was not on a matter of public concern. *Id.* at 16-19. The Sixth Circuit wrongly held that TSSAA's voluntariness arguments were relevant only to the issue of waiver, and remanded for trial under intermediate scrutiny. Pet. App. 7-8[1]. On certiorari, TSSAA defended the Sixth Circuit's analysis against Brentwood's contention that *strict scrutiny* should apply, but argued that the case warrants "intermediate scrutiny *at most*" and again emphasized the voluntary nature of the relationships, citing, *inter alia*, *Rust v. Sullivan*, 500 U.S. 173 (1991). Br. in Opp. at 20-22, No. 01-1117 (emphasis

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[1] "Pet. App." refers to petitioner's appendix filed in this Court. "Pet." refers to the Petition for a Writ of Certiorari. "Opp." refers to Respondents' Brief in Opposition. "CAJA" refers to the Joint Appendix filed in the Court of Appeals. "Tr." Refers to the trial transcript.

added). And on the final appeal from which TSSAA now seeks review, the Sixth Circuit understood TSSAA's argument and did not suggest that it had been waived—merely that its own prior decision applying intermediate scrutiny was law of the case. Pet. App. 88-90.

Second, Brentwood suggests that TSSAA admitted in an interrogatory that its rule is not narrowly tailored. Opp. 6. The district court recognized both that this was an obvious typographic error, and that "the theories of the parties make it clear that TSSAA contends that the rule's narrowly tailored." Tr. 2738. The unattributed quotes at the bottom of Opp. 6 are from Brentwood's *own lawyer*, not the district court. Brentwood's gamesmanship was clearly rejected by the court, Tr. 2733-39, and it did not argue this point to the Sixth Circuit or even designate the response in the CAJA.

Third, Brentwood suggests that this case is somehow not ripe because it has other claims not yet addressed in the district court. Opp. 4. Those claims are irrelevant to the issues here—and are, to put it charitably, unpromising.[2]

Finally, Brentwood accuses TSSAA of "heavy-handed threats of retaliation," Opp. 1, because of its prediction that the Sixth Circuit's analysis may spell the end of public-private cooperation in athletic associations. That concern is echoed by the amicus briefs of every public school athletic association in the country, and is not a threat but simply an observation about the choices that those associations will face if this decision stands. Brentwood concedes by its silence that public schools have every right to organize and agree on whatever restrictions on recruiting "speech" they believe to be required by their educational and athletic goals. *See Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006). The Sixth Circuit's decision means that if such associations permit private schools to join (and there is absolutely no reason they have to), then those private schools cannot credibly promise to follow the same rules of competition as

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[2] Brentwood's rational basis equal protection claim is a non-starter, and Brentwood has been unable even to articulate what its antitrust theory is.

everyone else—and the association will be exposed to enterprise-threatening constitutional litigation arising out of every internal dispute with those schools.

2. On the merits, Brentwood argues that "TSSAA's regulatory conduct vis-à-vis BA is subject to conventional First Amendment scrutiny of governmental regulatory conduct." Opp. 17. It echoes, in other words, the Sixth Circuit's holding that the "applicability of the First Amendment ... does not vary depending on ... whether the relationship between the government and the speaker is voluntary or contractual." Pet. App. 94. As the petition demonstrated, that is clearly inconsistent with numerous decisions of this Court and other courts of appeals recognizing that voluntary participants in government programs may be asked to accept some limits on their in-program speech, so long as those limits are consistent with the objectives of the program. Remarkably, Brentwood does not discuss or even cite *Pickering*, *Connick*, *Umbehr*, *Rust*, or *Snepp v. United States*, 444 U.S. 507 (1980), or any of the court of appeals cases cited in the petition. Instead it makes three basic arguments, all of which are unpersuasive.

First, Brentwood argues that intermediate scrutiny must apply here because this Court held that TSSAA's conduct is "regulatory." Opp. 17. That simply elides the central question of whether TSSAA is "regulating" through sovereign power or merely exercising contractual authority. This Court's holding that TSSAA is a state actor does not remotely end that inquiry. Public employers "regulate" their workplaces and are certainly state actors, yet this Court has held that the employment relationship justifies an entirely different First Amendment analysis than, for example, a city's "regulation" of a public park. This Court held that the speech restriction in *Umbehr* would have triggered strict scrutiny if imposed on the public under the state's "sovereign power," but was entitled to great deference when imposed pursuant to "contractual power." 518 U.S. at 678. The administrators of the program in *Rust* similarly "regulated" the speech of participants in a sense.

Brentwood never disputes that TSSAA has no power over it other than what Brentwood has voluntarily agreed to.

Second, Brentwood suggests that its decision to join TSSAA is coerced because there are no "viable regulatory alternatives to TSSAA." Opp. 4. But Brentwood admits that it "voluntarily submits to TSSAA's regulatory authority," Opp. 20, and the Sixth Circuit confirmed that "[t]he TSSAA is a voluntary association," Pet. App. 79, as did this Court, *Brentwood Acad. v. TSSAA*, 531 U.S. 288, 291 (2001) ("*Brentwood I*") ("no school is forced to join"). The evidence showed that Tennessee schools arrange athletic competition without belonging to TSSAA. CAJA 879-883, 1100, 1304-05. Brentwood Headmaster Emeritus Bill Brown testified that he considered TSSAA membership to be entirely voluntary, that Brentwood could have chosen to compete independently as the Webb School in Bell Buckle does, and that he simply did not feel that the Tennessee Athletic Association of Christian Schools "would have been the place for our school really." CAJA 565, 574-75. TAACS appears to have 40 member schools in Tennessee. *See* http://www.tacs1.org/memberschools.php?state=TN. There can be no serious dispute that Brentwood has other options. Its real argument is that competing for statewide athletic glory requires membership in TSSAA, but this Court and others have always rejected arguments like that. Pet. 15.

Third, Brentwood argues that a host of this Court's cases establish that First Amendment analysis is not altered by a contractual relationship between the speaker and the government. Brentwood misses the point of those cases.

Brentwood argues that *Keller v. State Bar*, 496 U.S. 1 (1990), and *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), demonstrate that compelled speech is analyzed the same "whether [the] compulsion derives from positive law (*Keller*) or contract (*Abood*)." Opp. 22. *Keller* and *Abood* are unconstitutional conditions cases, and actually apply an analysis similar to *Pickering*, *Umbehr*, and *Snepp*. *Abood* dealt with union dues that public employees were required to pay as a condition of employment, even though they were

not members of the union that represented them. This Court held that such dues can be spent on speech only if it is "germane" to the union's collective bargaining activities. *Keller* held that state bar fees required as a condition of practicing law could only be spent on speech "germane" to "the State's interest in regulating the legal profession and improving the quality of legal services." 496 U.S. at 13. Neither case supports Brentwood's (and the Sixth Circuit's) position: that conditions attached to voluntary participation in government programs are exactly the same as laws imposed coercively on the public. The general public cannot be forced to support union activities *at all*, no matter how "germane" to the union's bargaining role. *Keller* and *Abood* hold that participants in voluntary government programs may be asked to accept limits or burdens on their speech rights that the government could never impose on the general public, so long as those burdens are "germane" to the program's legitimate purposes. That is TSSAA's point.

Brentwood also relies upon "public forum" cases. In *Southeastern Promotions, Ltd. v. Conrad*, for example, this Court applied intermediate scrutiny to a private theater owner because the theaters it controlled were "public facilities" deemed to be "public forums designed for and dedicated to expressive activities." 420 U.S. 546, 555 (1975). The basis for this Court's rulings in *Widmar v. Vincent*, 454 U.S. 263 (1981), *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995), and *Bd. of Regents v. Southworth*, 529 U.S. 217 (2000), was also that the schools had created limited public forums to encourage expressive activity, and therefore could not discriminate among viewpoints in regulating those forums. Brentwood correctly notes that the relationship between a university and its students is contractual, but again misses the point that these are unconstitutional conditions cases. *Southworth* explicitly relies on *Keller* and *Abood*; it simply explains that, in the context of a public forum created within a university to promote free expression, the usual "germaneness" inquiry would be inappropriate. 529 U.S. at 230-32. When

restrictions on speech *are* consistent with the legitimate purposes of the contractual relationship—as in *Connick*, *Pickering*, *Umbehr*, *Garcetti*, *Rust*, and *Snepp*, which Brentwood entirely ignores—this Court routinely holds that such restrictions are entitled to very substantial deference.

The point is that context matters in First Amendment doctrine, and speech restrictions required as a condition of voluntary participation in government-sponsored programs are analyzed differently from restrictions imposed on non-consenting members of the general public. The fact that some contractual restrictions on voluntary participants in government programs are invalidated—as in the public forum cases Brentwood cites—does not remotely establish that the voluntary nature of the relationship is irrelevant.[3]

Brentwood also misunderstands the circuit split created by the Sixth Circuit's decision. It argues that the waiver cases cited in the petition are "case-specific" and that "no waiver exists here." Opp. 22-23. But Brentwood specifically agrees in writing to comply with TSSAA's recruiting rule. CAJA 1951-64. At least four circuits have enforced such up-front agreements to limit speech. Pet. 20. Brentwood suggests no way to distinguish those cases, and there is none. Brentwood then suggests that the other cases cited in the petition involved "non-regulatory conduct." Opp. 27. That is inconsistent with Brentwood's own expansive conception of what counts as "regulatory." The authority exercised by the state actor 4-H program over its members

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[3] Brentwood suggests that *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), supports its notion that voluntary interactions with the state are the same as coercive police power regulation. This Court held in *Bantam Books* that the conduct in question was "not voluntary" and that "[p]eople do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around." *Id.* at 68. It also wrongly suggests that the state exercised no "sovereign authority" in *Ibanez v. Florida Dep't of Bus. & Prof'l Regulation, Bd. of Accountancy*, 512 U.S. 136 (1994), because Ibanez could have "perform[ed] accounting functions without a license." Opp. 19. By statute she could not, however, hold herself out as a CPA or attest to the reliability or correctness of financial statements. 512 U.S. at 139.

in *Gorman-Bakos v. Cornell Coop. Extension*, 252 F.3d 545 (2d Cir. 2001), or by the ROTC program in *Blameuser v. Andrews*, 630 F.2d 538 (7th Cir. 1980), or by the volunteer fire departments in the cases at Pet. 22 n.6, is not different from TSSAA's relationship to its members. Pet. 21-22. Eight circuits apply the *Pickering* test to such relationships, and only the Sixth Circuit applies intermediate scrutiny.

3. Brentwood argues that TSSAA's interest in competitive equity is "conjured up" or insincere, Opp. 10 n. 5, just after spinning out an absurd conspiracy theory that TSSAA sought to punish Brentwood *because it was winning too many games*. Opp. 7-9. Apparently it fails to appreciate the inconsistency. As anyone who has ever competed in athletics knows (and amici confirm), reasonably balanced competition is essential because a perception of futility will harm morale and participation. Pet. 23; Br. of Nat'l Fed. of State High School Assocs. at 5 ("[S]tudents who lose games consistently will lose the willingness to compete."). That is one reason why every public high school athletic association prohibits athletic recruiting. *Id.* at 2. It is also why they put schools in divisions (such as 1A–5A in football) so that schools of similar size compete against one another. *See* Br. of Michigan High School Athletic Ass'n, et al. at 6.

Brentwood forthrightly embraces the Sixth Circuit's holding that competitive equity is not a substantial state interest and could never justify limits on recruiting speech. Opp. 11 n.6. To our knowledge no court has *ever* endorsed that conclusion before. Courts have consistently recognized the importance of competitive equity at all levels. Pet. 22-25. Brentwood argues that a focus on competitive equity subordinates the interests of students to the interests of the association. Opp. 11 n.6. That might make sense for the NFL or NCAA, which have institutional economic interests in competitive equity apart from its consequences for the players. But TSSAA is a non-profit with no economic interests of its own. It tries to promote competitive balance because, and only because, it believes that is the best thing for students. The real dispute here is that TSSAA believes

that vigorous and reasonably balanced competition will promote participation, sportsmanship, and teamwork, and Brentwood believes it should be free to do whatever it wants to pursue as many championships as possible.

4. Brentwood also embraces the Sixth Circuit's mistaken focus on these narrow facts, and urges that it correctly concluded that this particular violation of the recruiting rule was so harmless that enforcement should have been waived. Second-guessing such judgments is not an appropriate role for federal courts. This Court has always asked whether a *rule* is supported by substantial state interests, not whether enforcement in a particular case satisfies heightened scrutiny. Pet. 19. Brentwood argues for an exception on the ground that TSSAA's recruiting rule is "ad hoc" and "case-specific." Opp. 26. But the prohibition on "undue influence" is accompanied by several pages of guidance and examples, including one covering Brentwood's precise conduct. Only Brentwood could find guidance prohibiting "initial contact" with "a prospective student/athlete enrolled in any member school," Pet. App. 164, to be "ad hoc" as applied to Brentwood's initial contact of prospective athletes at other member schools. And many time, place, and manner regulations upheld by this Court required case-specific application. Pet. 19. This Court rejected "least restrictive means" analysis in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), and again in *Rumsfeld v. Forum for Acad. & Instit. Rights, Inc.* ("*FAIR*") 126 S. Ct. 1297 (2006), which means that rules may be applied in debatable circumstances. No athletic league could function if participants can litigate whether the rules should have been overlooked in their case.

5. On the due process issue, Brentwood does not dispute that it received notice of the allegations, an evidentiary hearing with counsel where it submitted affidavits and questioned witnesses, and an appeal to the full board. That is the process Brentwood voluntarily contracted to receive, and is sufficient under *any* standard. It contends, and the Sixth Circuit held, that due process was violated because the decisionmakers discussed matters that Brentwood had

notice of but did not expect to be important. But no litigant has a right to anticipate and respond to everything that is discussed in the jury room. The same voluntary agreement that constrains Brentwood's First Amendment claim answers its due process claim. This issue merits review if this Court reviews the First Amendment issues, if only because Brentwood may remain eligible for a large and entirely unjustified fee award unless it is reversed.

6. Brentwood argues that nothing has happened since *Brentwood I* to justify reconsideration. But as this case and the cases and commentary cited at Pet. 27-29 show, it has become clear that the *Brentwood I* standard is unworkable, and that treating voluntary athletic associations as state actors opens a Pandora's box. The Sixth Circuit's tortured analysis and absurd conclusions here illustrate that high school sports and constitutional law are a bad combination.

7. Brentwood argues that a GVR in light of *Garcetti* is unnecessary because it dealt with employees, "not restraints on speech involving government as regulator." Opp. 23 n.12. But if TSSAA "regulates" its members, the public employer in *Garcetti* also "regulated" its workforce. The sources and nature of the power exercised in both situations are similar. Brentwood remarkably tries to dismiss *FAIR* by arguing that it held that military recruiting is conduct, not speech. *Id.* That is yet another reason for remand. *FAIR* also clearly rejected the kind of "least restrictive alternative" analysis applied by the Sixth Circuit here. And the fact that *FAIR* was decided ten days before this decision does not make a remand inappropriate. *See Lawrence v. Chater*, 516 U.S. 163, 167 (1996) ("recent developments that we have reason to believe the court below did not fully consider").

CONCLUSION

The petition for a writ of certiorari should be granted.

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ARGUMENT

TSSAA's member schools have made the collective decision not to use "undue influence" in recruiting students "for athletic purposes." The statewide athletic associations of every state have a similar rule, because it is the consensus judgment of educators (including Brentwood's own headmaster, JA 452) that athletic recruiting at the high school level is harmful and inappropriate. Brentwood and its *amici* try to portray brazen athletic recruiting of vulnerable children as the provision of truthful and accurate "information" about their schools necessary to the exercise of "school choice." But if Brentwood wishes to offer an educational product that includes athletic recruiting, and advertise that product directly to every student in America, it is free to do so. It is not entitled, however, to remain a member of a voluntary membership organization committed to the opposite philosophy, and conscript the other members of that organization into participating in a form of athletic competition they have expressly rejected for themselves.

Brentwood claims to be arguing for "traditional" First Amendment analysis, but its framework is the "traditional" analysis only for speech restrictions in public forums, imposed by the state on unconsenting members of the public, and backed up by coercive sovereign power in the form of criminal or civil penalties. A limitation on speech accepted by participants in a voluntary government program, and enforced only contractually, raises different concerns. In such cases the "traditional" analysis (called the unconstitutional conditions doctrine) focuses on whether the agreement was truly voluntary, and on whether the condition is reasonable and germane to the purposes of the program. The recruiting rule defines a core value of this program, and is eminently reasonable. Brentwood cannot cite a single case in which this Court has invalidated a voluntary restriction on private concern speech that a state reasonably concludes poses a danger of harm to minors.

Brentwood contends that it was deprived of contractual

rights without due process, but it is free to invoke the ordinary "process" due for such harms: a state law action for breach of contract. Nothing about this context requires pre-deprivation "process" at all, but the hearing Brentwood received satisfies what this Court has required before firing a tenured public employee. It is entitled to no more.

This Court can correct the Sixth Circuit's particular errors here, but that is a limited solution. The only way to spare litigants and the federal courts from perpetual litigation over issues nowhere in the vicinity of core constitutional concerns is to hold that voluntary associations like TSSAA do not engage in state action when they enforce mutually agreed-upon game rules.[1]

1. Brentwood and its *amici* argue that the athletic recruiting limitations voluntarily adopted by educators in every state are a threat to "school choice" or to the flow of information from schools to students and parents, necessary to marketplace competition. This is dangerous nonsense.

First, they argue as if athletic recruiting cannot harm students unless it involves coercion or outright bribery. But recruiting impressionable children specifically for athletic purposes inherently threatens to distort their developing values, and sends an improper message about the relative place of athletics in secondary education. Educators in this country face enormous challenges created by a popular culture that glorifies athletic over academic achievement, and unrealistically encourages young people to believe that professional sports are a viable mainstream career path. Educators are entitled to conclude that *their own schools* should not reinforce these myths. Recruiting rules also help protect the purposes and safety of high school athletics by

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[1] Brentwood wrongly suggests that the state action issue "is not properly before the Court." Resp. Br. 22 n.23. That issue is literally within Petitioner's Question Presented, and was argued in the Petition. Brentwood itself briefed the state action issue in its Opposition, did not challenge the propriety of addressing it, S. Ct. R. 15.2, and even identified it as the very first issue before this Court. Opp. at i.

minimizing dispiriting and dangerous lopsided contests. High school students vary widely in size and athletic ability. A school that actively recruits for athletic talent could field a nearly semi-pro football team that could actively harm its competitors. Br. of Nat'l Sch. Bds. Ass'n at 19-21. Even if there is a place in American education for such practices, TSSAA and its members are entitled to conclude that they do not want to participate in competition on those terms.

Second, as Brentwood stipulated, its participation in TSSAA is entirely voluntary. JA 274. Its headmasters testified that the school did not join under "compulsion" (JA 449), and that it is free to leave TSSAA at any time (JA 445-46). Its brief further concedes that TSSAA "would have no authority over Brentwood if the school [had] not agreed to be bound by [its] rules and regulations." Resp. Br. 34. As this Court has already confirmed, "[n]o school is forced to join." *Brentwood Acad. v. TSSAA*, 531 U.S. 288, 291 (2001) ("*Brentwood I*"). And there are other options. Countless independent schools nationwide do not belong to the largest statewide athletic associations in their state. Brentwood's own expert witness, Michael Obel-Omia, testified that his school elects to play in an Independent School League in New England. CAJA 1509. In Tennessee, other Christian schools, like Brentwood, have formed a Christian League (JA 433); Brentwood already participates in separate lacrosse and swimming leagues (CAJA 813); and Brentwood has *chosen not to join TSSAA for its middle school programs*, and plays in the Harpeth Valley Athletic Conference instead.[2] Further, non-member schools are still able to play regular season games with TSSAA members. TSSAA's executive director testified without contradiction that, but for one exceptional circumstance, TSSAA has "never declined" to allow its members to play nonmembers. CAJA 880; *see also* JA 450-51 (Brentwood headmaster confirms that TSSAA schools play nonmembers). As this Court noted in *NCAA v. Tarkanian*, 488 U.S. 179, 198 n.19

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[2] *See* http://www.brentwoodacademy.com/page.cfm?p=25.

(1988), leaving the NCAA would have been a blow to UNLV's vision of athletic glory, "[b]ut that UNLV's options were unpalatable does not mean that they were nonexistent." All Brentwood would have to give up here is the chance to win *TSSAA* tournaments.

Third, this rule does not deprive Brentwood of its ability to "tell its story" or inform students and parents about what it has to offer. TSSAA's recruiting rule applies *only* to the use of "undue influence" to secure or retain students "for athletic purposes." CAJA 988, 1267; Tr. 2202-06. *Amici* claim to be concerned that *any* contact with a prospective student, even if purely about academic or artistic programs, could be considered a violation. That is inconsistent with the plain text of the rule, and they do not point to any instance of such application. *This* communication was from the football coach, about football practice.[3] And even when it comes to athletics, the Sixth Circuit expressly held that it "does not mean, however, that Brentwood has no other outlet for providing such [athletic] information to prospective students, or that middle school students have no way of ... learning about their educational options." Pet. App. 11a. It found "numerous ways in which Brentwood can get its message about athletics out to prospective students," and listed several options. *Id.* at 11a-12a; JA 257 (Carter letter with similar options). Brentwood could send its message through open houses, meetings at other schools, and myriad diversity outreach programs. CAJA 2185-90. It had no difficulty getting its message out as a TSSAA member, and having outstanding football teams, for 25 years before this incident. It already had a system in place to send out packets to the families of students who had signed enrollment contracts, including information about athletic

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[3] Brentwood's current headmaster confirmed that the spring practice letter "certainly ... has an athletic purpose." CAJA 1402. Its former headmaster conceded the letter was "only" about "football." CAJA 634. And Ronnie Carter testified that while specific intent to violate the rule is not required, he does look to the context to determine whether the conduct has an athletic purpose. Tr. 1531-33.

schedules, CAJA 549-50, and that was perfectly permissible under the rule, CAJA 705 ("they could also have sent the information out at the time of acceptance ... [i]n a packet"). Brentwood's headmaster was asked "when you're talking about defending the school or right to tell its story ... that's not the spring practice letter and phone calls, is it?"; he responded "[n]o, sir." CAJA 633-34.[4]

Brentwood and its *amici* complain that even though the recruiting rule and guidance leave *schools* free to communicate in any number of ways, they impose more restrictive limits on *coaches*. There is no good reason why a school's direct recruiting ambassador has to be a coach, and there is no good reason why recruits need to be discussing financial aid with the football coach rather than the financial aid office. These are reasonable prophylactic attempts to curb obvious opportunities for abuse. And the suggestion by *amici* that athletic recruiting is the only effective way to reach underprivileged and minority students is offensive.

Brentwood's rhetoric about school choice seeks to mask how unusual these communications were. As Brentwood admits, "undue influence" in athletic recruiting under TSSAA rules includes "exceeding what is appropriate or normal." Resp. Br. 10. Brentwood had never sent *anything* similar to this "spring practice letter" before, and it has never identified any example of any other school in Tennessee sending such a letter to students still enrolled at another school. Coach Flatt sent the letter despite his stated preference that Brentwood's own 8th graders generally *not* attend spring practice because they would be intimidated. CAJA 1168. Brentwood's headmaster testified that the letter and calls were so unusual he "would have thought" Coach Flatt should have asked TSSAA about their propriety in advance. CAJA 585. He did not.

This was a black-and-white violation of the guidance

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[4] A headmaster from Memphis testified that "the independent schools in Memphis have come together and made an agreement that they won't try to recruit each other's kids," aside from TSSAA rules. CAJA 1271.

accompanying the rule, which states that "a coach may not contact a student or his or her parents prior to his enrollment in the school." JA 181. Whatever the outer bounds of the recruiting rule, Brentwood was on notice that *this conduct* was prohibited. While application of the guidance of course requires consideration of the facts of each case, Ronnie Carter confirmed that TSSAA "look[s] to the guides in interpreting the rule," CAJA 717, and a Board of Control member agreed that the "questions and answers are there to help you understand the rule itself." CAJA 1115.

Under any standard, this letter was inappropriate. Brentwood's famous football coach, for the very first time, sent a letter in the spring solely to students then-enrolled in other middle schools, describing Brentwood's football team as "your" team, admonishing them that it would "definitely be to your advantage" to attend spring practice, inviting them to call him at home, and signed "Your Coach." JA 119. Several experts testified that there is great potential for abuse in coach communications with students enrolled at other schools. CAJA 1744, 1749, 1544, 1676; *see Fla. Bar v. Went for It, Inc.*, 515 U.S. 618 (1995) (upholding rule limiting letters to accident victims in first 30 days even though many might not actually cause harm). Although those students had signed up to attend Brentwood the following year, Brentwood knew they were not yet "enrolled" as defined in TSSAA's bylaws—and hence undue influence in recruiting them to attend was still prohibited. Tr. 416. Every year 3 to 5 students sign enrollment contracts at Brentwood and do not attend, CAJA 563, and Brentwood acknowledges that some students sign multiple enrollment contracts, Tr. 2424. Several of the students receiving this letter were regarded as the leading athletes in the entire city, and one of them had been admitted to Brentwood the prior year but had declined to attend. JA 122; Tr. 284-93. The letter was so effective that every student who received it left the school they were attending to go to Brentwood's spring practice. Coach Flatt admitted that he realized some students would not view the letter as optional. JA 301-02. Although this

was ostensibly a football practice, Brentwood's varsity basketball coach met with two of the top athletes there. JA 133. Brentwood advertised that it took "athletic abilities" into account when allocating financial aid, JA 444, and Coach Flatt (who had previously engaged in the recruiting of fifth graders, Tr. 150-51) sat on the admissions and financial aid committees, CAJA 554. TSSAA stated that it was not the information in the letter that violated the rule, but the "manner" in which the entire affair was conducted. JA 241. The fact that attending spring practice was allowed at the time certainly does not make undue influence in recruiting kids to attend such practices harmless, or into nothing more than "informational" speech about a "lawful" activity.

2. Brentwood argues that its voluntary decision to join TSSAA and agree to its rules is irrelevant. But context always matters in First Amendment analysis. Whether Brentwood's agreement to abide by the "rules and decisions" of TSSAA, JA 230-31, is a "waiver" or simply a substantive constraint on the scope of its rights, that agreement is significant to the First Amendment analysis—just as in *Rust v. Sullivan*, 500 U.S. 173, 199 (1991), and *Snepp v. United States*, 444 U.S. 507, 510 (1980).

Brentwood has no persuasive response to this Court's cases holding that government may offer citizens a "reasonable choice" to participate in voluntary government programs, subject to conditions it thinks necessary to the administration of the program. Brentwood argues that *Rust* and *United States v. Am. Library Ass'n*, 539 U.S. 194 (2003), apply only to conditions on the expenditure of funds. Resp. Br. 37-39. As the United States points out, "there is no basis for distinguishing a cash 'subsidy' from other optional government benefits." U.S. Br. at 17; *see also* NSBA Br. at 6-9. Surely *Rust* would not have been different if Congress had opened *its own* family planning clinics and invited doctors to volunteer, subject to the condition that they not discuss abortion while doing so. Similarly, if TSSAA could "fund" someone else to run tournaments subject to the reasonable condition that participants not use undue

influence to recruit for athletic purposes, then it can offer such tournaments itself subject to the same condition.

This Court also explained in *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 678 (1996), that strict scrutiny would have applied "if the Board had exercised sovereign power against him as a citizen in response to his political speech," but that "in this case, as in government employment cases, the Board exercised contractual power, and ... [d]eference is therefore due to the government's reasonable assessments of its interests *as contractor*." *See also Connick v. Myers*, 461 U.S. 138, 152 (1983) ("wide degree of deference" due to public employer's prediction of disruption). Brentwood's only response is that these cases are "altogether different" because it is not performing a service for TSSAA. Resp. Br. 40. That is not a meaningful distinction. TSSAA is offering a beneficial enterprise, in the form of organized competition. That endeavor requires rules, including some limits on the speech or speech-effectuated conduct of participants, such as unsportsmanlike behavior or recruiting. Any cooperative enterprise can work effectively only if the leadership has authority to take measures it reasonably believes to be necessary to the common good. "[O]rdinary dismissals from government service ... are not subject to judicial review" unless they genuinely involve an attempt "to suppress the rights of public employees to participate in public affairs" through "speech on matters of public concern." *Connick*, 461 U.S. at 146, 144-45. Ordinary dismissals from a government-sponsored voluntary *athletic league* are entitled to no greater solicitude. The fact that TSSAA delivers a benefit by organizing a sports league rather than by hiring persons to play in it changes nothing important to the analysis.

Brentwood's incantation that TSSAA is "regulating" athletics simply misses the central issues, which are the context of any "regulation" and the source of its authority. The NFL "regulates" football, and the NASD "regulates" securities dealers, with no constitutional scrutiny at all. Public employers "regulate" their workplace, and this Court

has applied very deferential standards. If TSSAA's rules were so unrelated to legitimate athletic or academic goals that insisting upon them as the price of playing would not present a "reasonable choice" to participants, then those rules would fail unconstitutional conditions analysis. But Brentwood cannot credibly contend that its voluntary choice is irrelevant to the First Amendment analysis.

3. Brentwood tries to defend that position by relying on a host of inapposite precedents. This Court has applied heightened scrutiny only if the government employs sovereign power through civil or criminal penalties, interferes with speech in a traditional public forum, or restricts or compels speech on matters of public concern through truly coercive "conditions" on government benefits.

First, Brentwood cites a number of cases in which this Court applied heightened scrutiny to restrictions that Brentwood mischaracterizes as voluntary. For example, it argues that the commission in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), had no prosecutorial power. Resp. Br. 24-25. But this Court found that "compliance with the Commission's directives was not voluntary," was "superimposed upon the State's criminal regulation of obscenity," and so coercive that it "obviat[ed] the need to employ criminal sanctions." 372 U.S. at 68-70. It relies on *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 629-32 (1943), which involved "a compulsion of students to declare a belief" upon pain of criminal penalties for the students and their parents. Brentwood cites the dissent in *Barnette* for the notion that attending public school is a choice, Resp. Br. 27, but that is not true for most families. Even if it were, all that means is that some choices, such as the "choice" to violate core religious beliefs, not to attend public school, or not to receive welfare benefits, *Sherbert v. Verner*, 374 U.S. 398 (1963), may not be "reasonable."

Brentwood similarly relies on cases in which states have used sovereign power to prohibit persons from practicing a profession without a license and to punish inappropriate behavior by licensed professionals. *See Edenfield v. Fane*,

507 U.S. 761 (1993); *In re Primus*, 436 U.S. 412 (1978). Brentwood suggests that those cases are apt because the regulated parties had the option of giving up their career in order to avoid the regulation. That obviously is not a "reasonable choice," and nothing like the feeble dilemma facing Brentwood. It protests that the accountant in *Ibanez v. Florida Bd. of Accountancy*, 512 U.S. 136 (1994), could have performed some accounting functions without the license, but she could not hold herself out as a CPA or attest to the correctness of financial statements. *Id.* at 139. Brentwood also relies on *Legal Services Corp. v. Velazquez*, but this Court held that the condition imposed on participation was an attempt to "distort[] the legal system" and "insulate the Government's laws from judicial inquiry." 531 U.S. 533, 544, 546 (2001). A choice that fundamentally undermines the judicial system may not be "reasonable," but that does not help Brentwood. If this line of cases were applicable (it isn't), the appropriate analogy is *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 464 (1978), which held that a state may adopt reasonable "prophylactic" measures to prevent and punish in-person solicitation by lawyers, where there is risk of exploitation and undue influence.

Second, Brentwood cites public forum cases. Resp. Br. 25-28. In *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975), the theaters "were public forums designed for and dedicated to expressive activities." In *Board of Regents v. Southworth*, 529 U.S. 217, 229-30 (2000), the program's "sole purpose [was] facilitating the free and open exchange of ideas," and, as such, "public forum cases are instructive here by close analogy." This Court has recognized the special status of the university in our society such that "the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted." *Rust*, 500 U.S. at 200. The same cannot be said of a sports league. And if "forum analysis" *were* appropriate here, TSSAA is clearly a nonpublic forum that may be limited by rules "reasonable in light of the purpose served by the forum."

Cornelius v. NAACP Legal Def. & Educational Fund, Inc., 473 U.S. 788, 806 (1985). That is, of course, very similar to unconstitutional conditions analysis.

Finally, Brentwood relies on *Keller v. State Bar*, 496 U.S. 1 (1990), and *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). This is a bold gambit. *Keller* and *Abood* apply the unconstitutional conditions analysis that Brentwood rejects, and hold that even burdens on speech *coercively* imposed upon participants in a common enterprise may be constitutional (without regard to the heightened scrutiny Brentwood wants to invoke) if they are reasonable and germane to the purposes of the enterprise. In *Abood*, for example, this Court explained that the collective bargaining system necessarily subordinates individual interests to the "collective interests" of the group. 431 U.S. at 222-23. "'As long as [the group's leaders] act to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy.'" *Id.* at 223 (citation omitted). The plaintiff had a valid claim to withhold his funds *only* with respect to "other ideological causes not germane to [the union's] duties as collective-bargaining representative." *Id.* at 235. That "germaneness" inquiry resolves this case in TSSAA's favor. *See* TSSAA Cert. Reply at 5-6.

4. Brentwood also argues that TSSAA's recruiting rule is vague or overbroad. Resp. Br. 44-47. Those arguments are not properly before this Court. The Sixth Circuit held only that the rule was unconstitutional as applied—and found that it "strains credulity" to claim this rule is vague or overbroad as applied to Brentwood's conduct. Pet. App. 21a. A "facial" vagueness or overbreadth finding, invalidating the rule in all cases, would be a substantial alteration of the ruling below for which a cross-petition was required. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 119 n.14 (1985) ("An argument that would modify the judgment ... cannot be presented unless a cross-petition has been filed."). Brentwood challenged the district court's refusal to enter an order invalidating the rule by cross-

appeal below, and lost. Pet. App. 130a-31a.

Regardless, the overbreadth doctrine "does not apply to commercial speech." *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982); *see also United States v. Edge Broad. Co.*, 509 U.S. 418, 430-31 (1993) (commercial speech requires only "reasonable" fit between regulation and "general problem" targeted). Brentwood's "school choice" arguments confirm that its recruiting efforts seek to solicit "customers" for a "commercial transaction" with the school. CAJA 1417-22; *see Ohralik*, 436 U.S. at 455 (rules against in-person solicitation to prevent undue influence regulate only commercial speech); *cf. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973) ("[A] proposal of possible employment" is a "classic example[] of commercial speech.").

A rule against "undue influence" in recruiting particular students "for athletic purposes" also is not substantially overbroad "judged in relation to [its] plainly legitimate sweep." *Osborne v. Ohio*, 495 U.S. 103, 112 (1990). Prior to this litigation, Brentwood never complained that the rule was unworkable, CAJA 894-95, and it has not cited a single instance of it being applied inappropriately. *Cf. N.Y. State Club Ass'n v. City of N.Y.*, 487 U.S. 1, 14 (1988) ("[A]ppellant must demonstrate from the text of [the law] and from actual fact that a substantial number of instances exist in which the Law cannot be applied constitutionally."). Brentwood and its *amici* argue for vagueness only by suggesting that TSSAA *might* enforce the rule in a manner inconsistent with its text (such as recruiting students for purely academic purposes). But "hypertechnical theories as to what the statute covers" and "speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid 'in the vast majority of its intended applications.'" *Hill v. Colorado*, 530 U.S. 703, 733 (2000). The cases Brentwood and its *amici* cite involve prior restraints imposed without any guiding standards or opportunity for review. *See Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130-

31 (1992); *Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757 (1988). There is no prior restraint here, there are real constraints on discretion, Pet. App. 20a, and any decision can be challenged through robust process. Since TSSAA does not have "unfettered discretion to deny [Brentwood's ability to speak] altogether," this case does not fall "within the narrow class of permissible facial challenges." *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989). And cases involving criminal penalties are inapposite. *E.g.*, *Houston v. Hill*, 482 U.S. 451 (1987). Moreover, when the government is articulating limits on voluntary or contractual programs, this Court has applied an entirely different approach. In *NEA v. Finley*, 524 U.S. 569, 588 (1998), this Court upheld a statute considering "decency and respect for the diverse beliefs and values of the American public" in awarding grant money. The statute was "undeniably opaque," but when the government is not acting as sovereign, "the consequences of imprecision are not constitutionally severe." And in *Waters v. Churchill*, 511 U.S. 661, 673 (1994), this Court confirmed that "a public employer may ... prohibit its employees from being 'rude to customers,' a standard almost certainly too vague when applied to the public at large."

The rules of a sports league require use of concepts like "unsportsmanlike conduct" or "undue influence," the application of which in a particular case may be debatable. *Ward*, 491 U.S. at 794 ("perfect clarity and precise guidance have never been required"); *Hill*, 530 U.S. at 733. Voluntary organizations often articulate values that define the very identity of the group. Applying those ideals will involve the exercise of judgment (what Brentwood calls "ad hoc"), but the member's recourse is that that judgment will be exercised by its peers to vindicate collective goals. The decision that Brentwood's conduct crossed the line was made by a panel of educators elected by all the members.

That point also answers the suggestion that the recruiting rule somehow infringes the right of students or parents to *receive* information. If a voluntary fan club decides that its members will support only the Red Sox, that

will affect the discourse heard by others. But no one has a right to remain a member of that organization while openly cheering for the Yankees, and no outsider can complain that the voluntary self-restraint of members is limiting what they hear. Brentwood seeks nothing less than a right to change the nature of TSSAA, and conscript the other members into participating in a manner inconsistent with their values. *Cf. Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656-57 (2000). And a ruling for it would create two separate constitutional regimes for TSSAA's members. If a public school coach had sent the spring practice letter to an 8th grader at Brentwood, he unquestionably could be fired, and the school sanctioned, with no First Amendment scrutiny.

5. The radical implications of Brentwood's position are best illustrated by its argument (and that of *amici*) that the recruiting rule is an attempt to suppress speech with particular content, subject to *strict* scrutiny. This rule does not prohibit discussion of any topic (or viewpoint), but merely the manner in which any message is delivered. It is facially directed at harmful *conduct* ("undue influence" in recruiting "for athletic purposes"), not speech.[5] And the speech affected is commercial solicitation of customers.

But if strict scrutiny *were* the result of analyzing this rule like a coercive law restricting the speech content of unconsenting citizens, that would illustrate why Brentwood's approach cannot be right. Brentwood would apply strict scrutiny (and rigorous vagueness and overbreadth standards) to a referee ejecting a player for speech evidencing "unsportsmanlike conduct," to a decision that a coach's promise of generous financial aid crossed the line into inducement, to a debate club's expulsion of a member who insists on proselytizing instead of debating the assigned topic, or to a bar association's decision that an

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[5] "'[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language ....'" *Ohralik*, 436 U.S. at 456 (citation omitted).

attorney exerted undue influence when soliciting clients.

6. TSSAA's interest in competitive equity has nothing to do with protecting the public schools, or subordinating the interests of students to the association. As the NSBA explains, consistently lopsided competition threatens both the educational goals of high school athletics (because dispirited students will not play) and students' physical safety. Every athletic league in the nation has rules that promote balanced competition, from Pop Warner to the NFL. Even Brentwood's headmaster agreed that "a fair chance to compete" and a "fair and even playing field" are important goals. JA 451. Brentwood's *amici* betray their own values by suggesting that the students TSSAA is trying to serve would learn more about "real life" by suffering through hopeless and physically dangerous mismatches. TSSAA's members are entitled to disagree, and to organize a league consistent with their objectives.

The "feeder pattern" commentary just recognizes that when a clear feeder pattern exists some contacts between the high school coach and the middle school students will be "normal and appropriate" by-products of joint activities and less likely to be, or to be perceived by students as, athletic recruiting. Tr. 2184. By analogy, contacts between Brentwood's coaches and middle-schoolers in its own captive feeder (Brentwood itself) are much less likely to be harmful than deliberate contacts with students at a school across town. Brentwood cites testimony that the range of permissible conduct is somewhat broader in the feeder pattern but no witness testified that the spring practice letter would have been permissible. To the contrary, as TSSAA's Executive Director testified, plenty of conduct targeting students violates the rule "whether it's in the feeder pattern or not," CAJA 698-99, and both he and a Board of Control member explicitly testified that *this* letter would have been considered a violation of the rule even if sent within a "feeder pattern." CAJA 991, 1295.

7. If Brentwood has any "property interest," it is a contractual entitlement. Where a plaintiff's interest "can be

fully protected by an ordinary breach-of-contract suit," then so long as the state "makes ordinary judicial process available to [the plaintiff] for resolving its contractual disputes, that process is due process." *Lujan v. G&G Fire Sprinklers, Inc.*, 532 U.S. 189, 196-97 (2001); *see also Parratt v. Taylor*, 451 U.S. 527, 544 (1981) (tort lawsuit is due process); *cf. Waters*, 511 U.S. at 679 (employee may be able to challenge employer's conclusions under state contract law). In *Lujan* the state decided that a contractor had not complied with a clause in its contract, imposed a fine, and withheld the fine from payments earned and due. This Court held that the option of suing for breach was sufficient. Brentwood too is free to sue under state law—for breach, for arbitrary action, or for a failure by TSSAA to follow its own rules.[6] TSSAA imposed a $3,000 fine but Brentwood has never paid it, and hence faced less immediate hardship than the plaintiff in *Lujan*. Even if the prospective playoff suspension infringed a property interest (which the Sixth Circuit declined to decide), Brentwood had time to seek preliminary injunctive relief in state court. And its main complaint is that it did not receive adequate "notice," but its notice rights are contractual and redressable in a contract action. The Sixth Circuit thus erred by using § 1983 to assess whether it *actually* received the required notice. To the extent aspects of TSSAA's decision (such as its exercise of discretion) would not be reviewed *de novo* in a state law challenge, that is because Brentwood agreed to be bound by a process very much like arbitration. *See Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056, 1063-64 (9th Cir. 1991) (rejecting due process challenge to arbitration award).

The combination of the available state remedies and the procedures TSSAA provided certainly satisfy due process.

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[6] *See, e.g., Cohn v. Baker*, 2006 Tenn. App. LEXIS 638, at *18 (Tenn. Ct. App. 2006) (state court will review internal decisions of association if it "acted contrary to its own policy or in an arbitrary or capricious manner"); *Coke v. United Transp. Union*, 552 S.W.2d 402, 405 (Tenn. Ct. App. 1977) (same); *TSSAA v. Cox*, 425 S.W.2d 597, 601 (Tenn. 1968) (review available if there is an "invasion of property rights or interests").

Brentwood is wrong that it was denied "'an explanation of [TSSAA's] evidence, and an opportunity to present [its] side of the story,'" Resp. Br. 48 (quoting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985)). It received ample explanation and opportunity. Brentwood's actual claim is that *Goldberg v. Kelly*, 397 U.S. 254 (1970), requires a full on-the-record hearing at which TSSAA proves its case, subject to formal cross-examination, and that the decision be based only on evidence "adduced at the hearing," before a previously uninvolved decisionmaker. But due process can vary based on the competing interests, and usually "something less than an evidentiary hearing is sufficient." *Mathews v. Eldridge*, 424 U.S. 319, 343 (1976). This Court has approved procedures like the ones used here in every case but *Goldberg* itself, including those involving the firing of tenured public employees, *Loudermill*, the firing of employees for disruptive speech, *Waters*, academic expulsions, *Bd. of Curators v. Horowitz*, 435 U.S. 78 (1977), and student disciplinary suspensions, *Goss v. Lopez*, 419 U.S. 565 (1975). Brentwood was afforded an opportunity to respond in writing and at two extensive hearings. Its complaints about "*ex parte* evidence" are just an indirect way of claiming that it was improper for the decisionmakers to consider anything other than what was presented at the hearing—and that therefore TSSAA should have been required to prove *its* "case" before decisionmakers with no prior knowledge. Even the Sixth Circuit understood that Brentwood was entitled to no such thing. The appropriate procedures are "shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions," *Mathews*, 424 U.S. at 344, and marginal gains from added process may be outweighed by the costs and harm to institutional interests, *id.* at 348. TSSAA needs to be able to interact with members, and members need to feel comfortable reporting issues, without the cloud of future cross-examination hanging over each conversation. And it would be unduly burdensome to force TSSAA to employ an independent adjudicatory operation.

8. Brentwood's due process complaints are also contradicted by undisputed facts of record.

First, there is nothing in the investigators' notes that was not specifically communicated to Brentwood in Carter's July 3, 1997 letter, and Brentwood has never claimed otherwise. *Compare* CAJA 4178-93 *with* JA 204-11. Nor has it identified any other "evidence" allegedly discussed at deliberations of which it lacked notice.

Second, Brentwood now argues that it had no notice that the King allegations remained at issue. But Carter's July 29 decision letter ruled Curry ineligible, and Brentwood does not even attempt to rebut TSSAA's explanation (undeniable on this record) that all of the allegations involving Curry centered around contacts with King. Pet. Br. 42-45. Tom Nebel, Brentwood's attorney at the two hearings, testified that he "knew that TSSAA was concerned about Mr. Bart King" before going into the August 13th hearing. Tr. 1491. After the August 13 hearing, Curry remained ineligible due to King's contacts. And, as TSSAA explained (Pet. Br. 44) without any rebuttal, Curry's testimony at the August 23 hearing was entirely in response to the King allegations.

Third, at the August 23 hearing, Brentwood replied to every allegation considered by TSSAA, including the King charges. It submitted King's affidavit (and the Board reviewed it, JA 269), which responds to every allegation in the July 3 letter (and, accordingly, to every allegation in the investigators' notes). It presented Curry's statement and live testimony. It would not have submitted this evidence if it had no notice that the Board might consider the King matters. Despite not calling King to the stand (because it had used all of its allotted time, JA 267), Nebel testified he was not prevented from presenting any evidence he wished at the hearings. JA 396-401.

9. This Court's conclusion that TSSAA engaged in state action when enforcing the recruiting rule against Brentwood should be reconsidered. *Brentwood I* departed from this Court's traditional focus on "the specific conduct of which the plaintiff complains." *Blum v. Yaretsky*, 457 U.S. 991,

1004 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982) (no state action in discharge of employees because despite "extensive [state] regulation ... generally, the various regulators showed relatively little interest in the school's personnel matters"); Br. of NCAA at 10-12. Instead, it looked principally to the "structure of the association," and whether the state "can sensibly be seen" as "entwined" in it.

The unworkability of that approach is apparent from the trial in this case, which allowed Brentwood to argue simultaneously that TSSAA's specific conduct here is—and is not—attributable to the state, burdening TSSAA with all of the obligations of a state actor while denying it the benefits. After *Brentwood I*, TSSAA moved to dismiss Brentwood's antitrust claims based on state action antitrust immunity. *Parker v. Brown*, 317 U.S. 341 (1943) (sovereign conduct immune under Sherman Act). The standards under the Fourteenth Amendment and for immunity are not identical, but they pose many of the same *factual* questions, and "[i]n both contexts ... courts examine whether the rule ... is a rule of the State." *Tarkanian*, 488 U.S. at 194 n.14.

Antitrust immunity requires a "clearly articulated and affirmatively expressed state policy." *Hoover v. Ronwin*, 466 U.S. 558, 568-69 (1984). To defeat immunity, Brentwood argued that "[n]o such imprimatur of the state as sovereign exists here," that "[n]o legislation recognizes TSSAA, so no 'clear articulation' by Tennessee 'as sovereign' exists from that source," and that the Board of Education "does not actively supervise the development of rules and regulations by the TSSAA." Br. of Brentwood Acad., Sixth Circuit Nos. 03-5245/5278 (June 8, 2004), at 62, 64 (citation omitted). In short, it argued that the specific conduct at issue here was not coerced or encouraged by the state, and urged liability on the premise that TSSAA acted, at most, with the acquiescence of the state.[7] Brentwood similarly defeated

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[7] Brentwood's only response to its factually inconsistent arguments has been to "admit[] that the above-referenced statement was made for the sole purpose of establishing that Defendants are 'state actors' ... [but]

qualified immunity for Carter in the trial court by arguing that the state does not participate in or endorse TSSAA's enforcement of the recruiting rule. Tr. 14-18, 1832-33, 2910. These contentions would have ended its constitutional claims under the traditional rule that there is no state action in the "absence of any allegation that the [challenged] decision was itself based upon some rule of conduct or policy put forth by the State." *Rendell-Baker*, 457 U.S. at 844 (White, J.). Even the *Blum dissent* argued that only "when the State directs, supports, and encourages [private] parties *to take specific action*, that is state action," 457 U.S. at 1028 (emphasis added) (Brennan, J., dissenting).

Entwinement is also unworkable because it undermines this Court's previous assumption that state action is also action under color of law. "Where the issue is whether a *private* party is engaged in activity that constitutes state action, it may be relevant that the challenged activity turned on judgments controlled by ... standards ... not established by the State." *West v. Atkins*, 487 U.S. 42, 52 n.10 (1988). Even if TSSAA could be deemed a state actor due to its structural "entwinement" for some purposes, it does not act under color of law when it promulgates or enforces mutually agreed-upon rules that the state never coerced or encouraged. Pet. Br. at 48-49. And, even if the state authorized TSSAA to "regulate" athletic competition among its public schools in some sense, and even if public school officials are entwined with TSSAA, TSSAA did not exercise power "possessed by virtue of state law," *West*, 487 U.S. at 49, or bring any force of the State to bear against *private* schools. TSSAA's only authority over Brentwood derives from Brentwood itself. Resp. Br. 34.

CONCLUSION

The judgment of the court of appeals should be reversed, and this Court should direct the entry of judgment in favor of TSSAA on the First Amendment and Due Process claims.

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that any such statement was not made in conjunction with its federal antitrust claims in this case." CAJA 287-99.

Respectfully submitted,

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In The
Supreme Court of the United States

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION,

Petitioner,

v.

BRENTWOOD ACADEMY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF *AMICI CURIAE* OF THE COLORADO HIGH SCHOOL ACTIVITIES ASSOCIATION, IDAHO HIGH SCHOOL ACTIVITIES ASSOCIATION, KANSAS STATE HIGH SCHOOL ACTIVITIES ASSOCIATION, MISSOURI STATE HIGH SCHOOL ACTIVITIES ASSOCIATION, NEBRASKA SCHOOL ACTIVITIES ASSOCIATION, NEW MEXICO ACTIVITIES ASSOCIATION, OREGON SCHOOL ACTIVITIES ASSOCIATION, AND WYOMING HIGH SCHOOL ACTIVITIES ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Amici will address the following two questions, which are addressed as part of the question framed in the petition for certiorari filed by the Tennessee Secondary School Athletic Association:[1]

> Whether the Sixth Circuit erred in holding that a voluntary agreement to join a high school athletic and activity association and abide by such association's bylaws and interpretive rules, such as the voluntary agreement between the TSSAA and Brentwood Academy, is irrelevant to a First Amendment constitutional analysis?
>
> Whether the Sixth Circuit erred in declining to recognize the substantial interest of state activity associations in fostering fair and level competition among member schools for purposes of protecting the best interests and safety of minor high school student participants?

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[1] *Amici* unequivocally supports the Petitioner's basis for requesting certiorari. *Amici* believes, however, that the Sixth Circuit's underlying reasoning that the voluntary agreement to join a high school athletic and activity association and abide by such association's by-laws and interpretive rules, such as between the TSSAA and Brentwood Academy, is irrelevant to a First Amendment constitutional analysis, and the Sixth Circuit's declination to recognize any substantial state interest in fair and level competition for purposes of the best interests and safety of minor student participants, impacts each of the *Amici* and its member schools, both public and private, more directly and substantially, and has therefore elected to focus its presentation to the foregoing questions.

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INTEREST OF *AMICI CURIAE*[1]

The *Amici* are all high school activity and athletic associations[2] (hereinafter collectively referred to as "the *Amici*"). The *Amici* respectfully submit this brief *Amici curiae* pursuant to Rule 37.2(b) of the Rules of the Supreme Court of the United States. The *Amici* are nonprofit associations formed under the laws of their respective states by action of each such association's member schools, both public and private. Membership in each of the *Amici* is voluntary and is comprised of various public and private high schools within their respective states. None are agencies or subdivisions of the state or local governments. The activity associations are not supported directly by tax dollars, and derive the largest portion of their modest revenues from member dues and gate receipts.

The purpose of the associations is to implement rules for interscholastic competition promulgated by the member schools, and to oversee and conduct interscholastic competitions between member schools. All of the *Amici* provide in their constitutions for a democratic governing structure whereby the member schools, public and private, participate in the development, drafting, and approval of all rules governing the member schools and the participation of students in activities sponsored by the associations. To that end, the *Amici* have each enacted bylaws and

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[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court of the United States, the *Amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than the *Amici* and their respective counsel made any monetary contribution to the preparation or submission of this brief.

[2] Colorado High School Activities Association (CHSAA), Idaho High School Activities Association (IHSAA), Kansas State High School Activities Association (KSHSAA), Missouri State High School Activities Association (MSHSAA), Nebraska School Activities Association (NSAA), New Mexico Activities Association (NMAA), Oregon School Activities Association (OSAA) and Wyoming High School Activities Association (WHSAA).

rules governing member high schools, including rules addressing eligibility requirements for participating in interscholastic athletic competitions.[3] Members contractually agree to abide by these member promulgated bylaws and rules. In many associations, each year the board of education of each public school and the governing board of each private school will pass a resolution stating that such school accepts the constitution and bylaws of the voluntary association as the minimum standards for conducting the school's interscholastic program.

These voluntary activities associations are committed to the development of America's youth through participation in high school interscholastic competition in a myriad of activities, including athletics, speech, debate and music. The *Amici* submit this brief and urge this Court to grant certiorari because the governance of interscholastic competition by and among the member schools of each of the above named activities associations has been and will continue to be directly, substantially and adversely impacted by the Sixth Circuit Court's ruling.

The District Court and the Sixth Circuit (1) incorrectly concluded that the voluntary agreement to join a high school athletic and activity association and abide by such association's bylaws and interpretive rules, such as that between the Tennessee Secondary School Athletic

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[3] The constitution and bylaws of each of the *Amici* Activities Associations and the National Federation of High School Associations can be found on their respective internet websites, to-wit: National Federation of High School Associations – http://www.nfhs.org; Colorado High School Activities Association – http://www.chsaa.org; Idaho High School Activities Association – http://www.idhsaa.org; Kansas State High School Activities Association – http://khsaa.org; Missouri State High School Activities Association – http://www.mshsaa.org (2006-2007 Official MSHSAA Handbook provided in PDF format upon request); Nebraska School Activities Association – http://www.nsaahome.org; New Mexico Activities Association – http://www.nmact.org; Oregon School Activities Association – http://www.osaa.org; and Wyoming High School Activities Association – http://www.whsaa.org.

Association (TSSAA) and Brentwood Academy, is irrelevant to a First Amendment constitutional analysis; and (2) incorrectly declined to recognize the substantial interest of high school activities associations in fair and level competition to protect the best interests and safety of minor student participants.

Because of the unique perspective and role of activity associations in their respective states that serves to promote interaction and cooperation between public and private schools in the United States to the benefit of the students that those schools seek to educate, the *Amici* believe that the attached brief will aid this Court in considering the petition. The *Amici* believe that this brief can add insight as to why it is important for this Court to grant the petition.

SUMMARY OF ARGUMENT

I. *A private school's voluntary contract with a high school activity association and its participation in the democratic rule making process of such association constitutes a voluntary and knowing limit on the scope of such private school's Constitutional rights under the rules so promulgated.* The Sixth Circuit incorrectly focused on the question of whether Brentwood Academy had waived its right to sue on the basis of its constitutional rights. Rather the Sixth Circuit should have focused on the nature of the agreement entered into between the private school and the association it voluntarily joined. By joining the activities association and entering into an agreement to abide by the bylaws and rules established by the member schools to provide for fair and equal competition, a private school is agreeing to participate in the democratic rule making process, and voluntarily and knowingly limiting the scope of its Constitutional rights regarding the rules so promulgated. By ignoring those facts, the Sixth Circuit majority enables the private school to challenge what is in effect its own rule.

The Sixth Circuit's holding creates a serious dilemma for activities associations. Either the association can (1) stay the course and risk years of economically devastating litigation; (2) rescind any challenged rule; (3) not apply a challenged rule to private schools; or (4) exclude private schools from membership. Alternative (1) is unpalatable for not-for-profit organizations like the *Amici*. Alternative (2) would fundamentally change the nature of the program of competition and disregards the legitimate programmatic objectives of the majority of the member high schools. Alternative (3) would lead to a patently un-level playing field among the members. Alternative (4) is really the only viable alternative left to these associations.

The Sixth Circuit's holding is particularly problematic for the *Amici* because of the inherently speech-related activities they govern (speech, debate, music) and because of competition rules that of necessity restrict speech. An association could be confronted with defending a constitutional lawsuit under intermediate scrutiny by a music competitor who wanted to perform a composition not on the approved list; and the association would have the burden of showing a legitimate and substantial interest in prohibiting non-list compositions and that the interest is served by prohibiting the particular non-list composition.

II. *Activity associations have a "substantial interest" in fostering a level playing field for student competitors in high school activities*: The Sixth Circuit erred in finding as part of its First Amendment analysis of the TSSAA recruiting/undue influence rule under the "intermediate scrutiny" standard that the association did not have a substantial interest in "fostering a level playing field." Activity associations have as their central purposes the fostering and maintenance of a level playing field for the students competing in the activity programs of member high schools. Each association's rule making process involves educators who are specialists in the field of fostering, promoting and caring for the safety and best

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interests of students, and assuring that students participating in school activities are provided a fair chance to participate in a manner that enhances their education and does not exploit them. The principle of competitive equity or a level playing field is basic value of schools, in fact our society as a whole, and is clearly a "substantial interest" of activity associations such as the *Amici* in this case. The Sixth Circuit failed to acknowledge that fairness or comparable opportunity is an inherent part of any competitive endeavor.

For the foregoing reasons, the *Amici* submit that the Petition for a Writ of Certiorari should be granted and the judgment of the Sixth Circuit should be reversed.

ARGUMENT

Interscholastic activities supplement and enhance the educational experience of the students of participating schools. The mission statements of the *Amici* echo this tenet.[4] Interscholastic competitions in athletics, speech, debate, and music instill in students an appreciation of teamwork, responsibility to self and others, personal discipline and the satisfaction of achieving a team or personal goal; attributes that cannot always be conveyed in an academic setting. These attributes are benefits that stay with students for the rest of their lives. However, high school activities must be kept subordinate to the academics

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[4] See, by way of example, WHSAA, Rules and Regulations, "Values" page 6, "The WYOMING HIGH SCHOOL ACTIVITIES ASSOCIATION believes that ***interscholastic activities programs are essential to the education of youth, and therefor, are an integral part of the school curriculum . . . The values of high school activities and their impact upon the lives of Americans are immeasurable . . . Not only do interscholastic activities benefit and directly influence participants, but they also instill pride and unifying spirit among students, fans, schools, and communities throughout the nation. The inherent values of activity programs are both realistic and vivid.***"

program and student progress therein. The lower courts in the present case correctly recognized this hierarchy of academics over activities.[5] However, the Sixth Circuit failed to recognize the critical interest of activity associations to foster the educational value of activities through competitive equity, and that the voluntary agreement of member schools to abide by rules is essential to protect that interest.

I. The Sixth Circuit erred in holding that a voluntary agreement to join a high school activity association and abide by such association's bylaws and interpretive rules, was irrelevant to a First Amendment constitutional analysis.

The Sixth Circuit erred in focusing on whether Brentwood Academy waived its right to challenge the constitutionality of a TSSAA rule rather than focusing on the nature of the agreement entered into between the private school and the association. *Brentwood Academy v. Tennessee Secondary School Athletic Association, et al.*, 262 F.3d 543, 549-551 (6th Cir. 2001) ("*Brentwood II*").

A. *Voluntary Associations of Educational Institutions*: Public and private schools have formed voluntary associations to establish rules of competition that keep activities in their proper place as an enhancement of the curriculum and overall educational experience of the students that they serve. All of the *Amici* employ a school member representative based rule making process to establish the bylaws necessary to further these goals. The

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[5] The Sixth Circuit Court of Appeals in its majority opinion found that the TSSAA, in promulgating the recruiting/undue influence rule, had a legitimate and substantial interest in keeping high school athletics in their proper place subordinate to academics, and in protecting student athletes from exploitation. *Brentwood Academy v. Tennessee School Athletic Association, et al.*, 442 F.3d 410, 425 (6th Cir. 2006) (hereinafter referred to as "*Brentwood III*").

representatives of each member school, public and private, are educators who are charged with the education and with the care and safety of the students participating in school activities. These educators bring their expertise to the adoption of the rules needed to assure activities are (1) kept in their proper place as an extension of the classroom; (2) not a deterrent to student learning; (3) available to the maximum number of students; and, (4) safe and in the best interests of all students. These educator representatives develop, draft and adopt the bylaws which govern the activities of their respective schools. It is through this democratic representative rule making process that member schools, like Brentwood Academy, can seek the adoption of a new rule, a change in an existing rule, or the outright repeal of a rule. Such a member based legislative process has been described as "the most elemental hallmark of the democratic process and one of associative groups – a majority vote." *Archbishop Walsh High Sch. v. Section VI of the N.Y. State Pub. High Sch. Athletic Ass'n*, 666 N.E.2d 521, 524 (N.Y. 1996).

By joining the activities association and entering into an agreement to abide by its bylaws and rules, a private school is agreeing to participate in the democratic rule making process, and voluntarily and knowingly limiting the scope of its Constitutional rights with regard to the rules so promulgated. By ignoring these salient facts, the Sixth Circuit majority enables the private school to challenge what are in effect its own rules. Such a circumstance cannot stand, as it is essential to activity associations that each of the member schools that voluntarily join the association abides by a common set of rules.

B. ***Participation in the Democratic Rule Making Process Limits the Scope of Private School's Constitutional Rights*****:** In *Vernonia Sch. Dist. 47j v. Acton*, 515 U.S. 646; 132 L. Ed. 2d 564 (1995), this Court found that students voluntarily relinquished Fourth

Amendment search and seizure protections in order to participate in high school activities.[6] Similarly, by choosing to join an activities association and participating in the association's democratic rule making process, private schools voluntarily relinquish some constitutional rights with regard to the application of association bylaws and rules to their speech. Such a rule protects the constitutional rights of the private schools, while recognizing the private school's voluntary relinquishment thereof to preserve the fair and equal participation in interscholastic activities.

C. A "Defacto" Two Class Membership: The Sixth Circuit decision creates a defacto two class membership among the *Amici*, one class made up of private schools, and the other of public schools, each having markedly different rights.

1. *Private School Members:* This Court in *Brentwood Academy v. Tennessee Secondary School Athletic Associations, et al.*, 531 U.S. 288, 305; 121 S. Ct. 924, 935; 148 L. Ed. 2d 807, 823 (2001), and the Sixth Circuit in *Brentwood II*, recognized that private schools are beneficiaries of the protections of the First Amendment and Fourteenth Amendment to the U.S. Constitution against state action by way of a cause of action brought under 42 USCS § 1983. *Id.* at 554. Thus, any decision of an activities association addressing the conduct of activity school programs by private schools or actions of individual private school instructors or coaches would be deemed protected speech; such protections being subject only to the voluntary limits on such rights relinquished by the private school (see, infra).

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[6] "There is an additional respect in which school athletes have a reduced expectation of privacy. By choosing to 'go out for the team,' they voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally." *Vernonia Sch. Dist. 47j v. Acton*, 515 U.S. 646, 657 (1995).

2. *Public School Members*: Conversely, the protections of the First Amendment and Fourteenth Amendment to the U.S. Constitution against state action are not available to public school districts, or their employees acting within the scope of their duties. In *Triplett v. Tiemann*, 302 F. Supp. 1239, 1242 (D. Neb. 1969), several public school districts sued the State Board of Education seeking to have a state funding statute declared unconstitutional under the supremacy clause and the equal protection clause. The court dismissed the public schools' equal protection claim, holding that school districts are legally not subject to injury under the Fourteenth Amendment, which has no application to the acts of a State against its own political subdivisions.[7]

In *Garcetti v. Ceballos*, 126 S. Ct. 1951; 164 L. Ed. 2d 689 (2006), this Court held that, "When public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.* at 1960; 164 L. Ed. at 701. Thus, any decision of an activities association addressing the content of school programs of public schools or actions of individual public school instructors or coaches would NOT be protected by the Constitution.

Thus, while a public school cannot legally challenge the constitutionality of an association bylaw, a private school has the right to challenge the constitutionality of every association bylaw or interpretive rule.

3. *Between a Rock and a "Hard Place"*: The Sixth Circuit's holding creates a serious dilemma for activities associations. Either the association can (1) stay

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[7] "The plaintiff school districts are legally not subject to injury under the Equal Protection Clause. The Equal Protection Clause of the Fourteenth Amendment has no application to the acts of a State against its own political subdivisions." [Citations omitted].

the course and risk litigation; (2) rescind any challenged rule; (3) exempt private schools from challenged rules; or (4) exclude private schools from membership. None of these options is in the best interests of the children. However, setting the best interests of students aside from a legal standpoint, the *Amici* find themselves in a no-win situation.

a. *Catch No. 1 – Private School's First Amendment Rights*: The Sixth Circuit holding that the private schools' voluntary agreement to abide by association bylaws does not abrogate any First Amendment right means that such schools may challenge any association rules on the basis of a violation of freedom of speech, religion, or association.[8] For the *Amici*, this dilemma is even more problematic because of their rules that of necessity restrict speech within the context of competition in the inherently speech-related activities they govern (speech, debate and music, and in some states drama and/or journalism). Many associations have rules that govern the "time, place and manner" of speech at such contests, some of which may in fact not be content-neutral.[9] This Court has given schools broad powers to limit the time, place, manner and content of student speech, and have applied those broad powers to extra-curricular activities. See, *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675; 106 S. Ct. 3159

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[8] The First Amendment assures the freedom of expression, including the implied right of association. The Supreme Court first recognized this right in *NAACP v. Alabama*, 357 U.S. 449; 2 L. Ed. 2d 1488; 78 S. Ct. 1163 (1958).

[9] See, 2006-2007 OSAA, Speech Handbook, Rule 13.5.4(c), "Offensive humor and materials shall not be permitted"; IHSAA – Activities Regulations, Speech, "Use of Materials": "1. Material presented by all contestants shall be appropriate for competition and public performance by high school students. A signed Principal's Approval Form must be submitted to both district and state tournament managers to verify the principal's approval of all material presented by his/her students"; see, also, NSAA, "Rules of Competition," Play Production ByLaws (5.5.1).

(1986) (where this Court found that a school district acted entirely within its permissible authority in imposing sanctions upon a student in response to his offensively vulgar, lewd, obscene or plainly offensive speech); and, *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260; 108 S. Ct. 562 (1988).[10] The deference given schools over student speech should apply to speech of a member school that is regulated to protect the children served by all of the member schools of an activities association.[11]

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[10] In *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), this Court held that while students in the public schools do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate, school authorities may place limitations on student speech if they have reason to believe that such expression will substantially interfere with the work of the school or impinge upon the rights of other students; and that a school need not tolerate student speech that is inconsistent with its basic educational mission, even though the government could not censor similar speech outside the school.

[11] The rationale for such deference was eloquently stated by the Missouri Court of Appeals' eloquent statement in a 1973 dispute over Missouri State High School Activity Association's summer camp rule in *Art Gaines Baseball Camp, Inc. v. Houston*, 500 S.W.2d 735, 740-41 (Mo. App. 1973):

> Along with entrusting the education of our children to teachers and administrators, we also entrust the control and supervision of the extracurricular activities incident to that education. Implicit in the responsibility for these activities is the power to make reasonable rules and regulations. We are dealing here with numerous schools who have voluntarily joined an association. **As members of this association, they may, by majority vote, enact rules to govern their interaction. It is obvious that chaos would result without such rules**. It is also obvious that the members are in the most advantageous position to appreciate the regulations under which they must act to achieve desired goals. A court should not interfere with the enactment of those regulations as long as they are reasonable and do not infringe on public policy or law. (Emphasis added; footnotes omitted).

Under the Sixth Circuit's holding, an association could be confronted with defending a constitutional lawsuit, under intermediate scrutiny, by a music competitor who wanted to perform a composition not on the approved list, or by a speech contestant whose speech contained cursing or was immorally suggestive. The association would have the burden of showing a legitimate and substantial interest in prohibiting such conduct.

(1) ***Absurd Result***: No association can function if each application of a common competition rule is subject to First Amendment constitutional litigation. All activities require a common set of rules for effective, fair and rewarding competition that supports the educational mission of the participating schools.

(a) ***Competition Rules***:

(i) ***Athletic Competition***: There are numerous applications of rules that limit the freedom of individuals and teams in athletic competition (football – off sides, pass interference; basketball – double dribble; wrestling – prohibiting a slam take down; track and field – requiring an athlete to stay within the discus ring for a throw to count; baseball and softball – three strikes and you're out!!).

(ii) ***Scholastic Competition***: Activity Association rules for scholastic competitions frequently address issues that implicate speech (debate contests – no scouting by a coach, judge or contestant in order to obtain advance information or an opponent's case or argument; speech contest – approval of content of material presented;[12] music contest – performance of compositions only on the approved list provided by the association; one-act play contest – material presented

[12] See, footnote 9 infra.

must be appropriate for competition and public performance by high school students;[13] and drill team/cheerleading – dress standards.[14]

(b) ***Conduct Rules*****:** All activities associations have rules requiring students to conduct themselves in a "sportsman-like" manner during interscholastic competition. Such conduct rules prohibit certain types of physical or verbal expressions that are not acceptable or may endanger personnel. These conduct rules certainly inhibit the "free" exercise of speech, association and action.

Competition and conduct rules and regulations are an inherent part of any interscholastic competition and level the playing field and give each student an equal chance at success. The *Brentwood II* and *Brentwood III* decisions destroy equal application of such rules of competition. To subject the application of every competition and conduct rule when applied to a private school or its students to a First Amendment "intermediate scrutiny" standard would make governance of high school activities impossible.

(2) ***Constant Cloud of Litigation*****:** The *Amici* will continually be threatened with litigation over the enforcement of their rules. Such threat will either chill the application of rules or require associations with limited resources to defend multiple court actions to establish that each regulation that is challenged is "content-neutral" under the First Amendment intermediate scrutiny test.

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[13] See, WHSAA, State Drama Tournament – Rules and Regulations, 8.4.3, Choice of Material, page 101, "Instructors will exercise good judgment in selecting plays with literary theatrical merit and which are suitable for high school level audiences."

[14] See, IHSAA – Activities Regulations – Dance/Drill, "Dress Standard": Dress Standard – Idaho dance/drill teams are expected to wear costumes which are appropriate for participation at the high school level.

b. *Catch No. 2 – Exclusion of Private School Members*: All of the *Amici* have as members most all of the high schools participating in interscholastic activities in their respective states. Excluding private schools from their membership invites litigation. Some courts have required activity associations to admit private school members,[15] while others have upheld the denial of membership.[16] In either case, the associations were required to incur the substantial cost to defend the decision to deny private school membership. The *Brentwood II* and *III* decisions will bring further pressure to separate the high school activities of public and private schools. And to what end – the exclusion of private schools that are valued members of the *Amici* to the detriment of the students of such private and public schools?

II. The Sixth Circuit erred in declining to recognize the activity associations' substantial state interest in fostering fair and level competition among member schools.

"Undue influence/recruiting rules" are essential to foster a level playing field, the primary purpose of which is to promote and foster competitive equity among schools in

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[15] See, *Friends Academy v. Section VIII of New York State Public High School Athletic Ass'n*, 154 Misc. 2d 1 (N.Y. Misc. 1992), where the court held the denial of membership to an activities association constituted a constitutionally impermissible denial of the nonpublic school's right to equal protection under the law, and declared the nonpublic school a member of the association.

[16] *Archbishop Walsh High Sch. v. Section VI of the N.Y. State Pub. High Sch. Athletic Ass'n*, 666 N.E.2d 521 (N.Y. 1996) held that the association's member referendum requirement did not deprive a private school of equal protection of the law, stating that the association's membership qualifications for nonpublic schools were consistent with and furthered the identified purposes by reasonably assuring that all member schools had the opportunity to compete on a relatively *level playing field*.

order to serve the best interests of the educational experience and welfare of all students. High school athletic and activity associations have as one of their central purposes the fostering and maintenance of a level playing field among member high schools. The Sixth Circuit held that the TSSAA had a legitimate interest "in fostering a level playing field," but that such interest was not substantial (*Brentwood III*, 442 F.3d at 425). The Court based this decision on a purported lack of evidence, stating "defendants (the TSSAA) can cite no evidence to support the notion that ensuring that high schools compete in interscholastic sports in an equitable manner is a substantial state interest." *Brentwood III*, 442 F.3d at 427. Such a statement ignores the basic mores of fairness that is a part of our American society; "fairness" in the sense of comparable opportunity which is an inherent part of any competitive endeavor. In athletic competition, as in many other activities, the need to give both sides a fair chance for success is self-evident and does not require proof to establish that the need is substantial.

A. *Activity Associations Have a Substantial Interest in Competitive Equity Among Member Schools*: Another term used by courts for "level playing field" is "competitive equity." The critical importance of "competitive equity" has been recognized by courts throughout the country. (See, *Cardinal Mooney High School v. Michigan High School Athletic Ass'n*, 467 N.W.2d 21 (Mich. 1991) (Age eligibility rule was held to be reasonably drafted to accomplish the association's purpose of maintaining "competitive equity" among member schools); *Indiana High Sch. Ath. Ass'n v. Reyes*, 694 N.E.2d 249, 257-258 (Ind. 1997) (Upheld association's penalties for using ineligible players); and, *Jones v. California Interscholastic Federation*, 197 Cal. App. 3d 751, 758 (Cal. Ct. App. 1988) (Upheld rule that created opportunity for younger students and competitive equity among association member schools by averting situations where teams of more veteran athletes encounter teams from schools where athletes have not been held back)). Competitive equity provides greater

opportunities for student participation and enhances the benefits of participation, such as the rewards of striving for and achieving a goal, being part of a team effort, dealing with success and failure, and knowing that effort will be required in some fashion and that success is possible. Where competitive equity is not maintained, these ideals become frustrated. Students quickly discern that goals either need to be diminished or cannot be achieved, fewer experience success, and participation is stunted.

B. ***A Level Playing Field or Competitive Equity Promotes Student Safety and Welfare:*** The level playing field concept directly addresses issues and concerns for student safety and welfare, particularly in contact sports. Student safety is a universally recognized substantial interest of high school activities associations. Courts throughout the country have recognized the critical role activity association bylaws, rules, and regulations play in promoting the safety and best interests of students through fostering a level playing field.

1. ***The "Age Rule":*** All of the *Amici* have an "Age Rule";[17] an objective rule that establishes an age limitation, usually 19 or 20, for participation. The Age Rule protects the safety of younger participants with or against whom an older participant might compete or participate.[18]

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[17] See, Age Rule: CHSAA, Constitution and Bylaws, Article 17, ByLaw 1760; "Recruiting"; IHSAA, Rules and Regulations, Rule 8-2; KSHSAA, Rules and Regulations Governing Grades 7-12, Rule 17, "Age"; MSHSAA, 2006-2007 Official Handbook ByLaw "Age Requirements" 232, page 26; NSAA, Bylaws for All Activities, ByLaw 2.3, "Age"; NMAA, Rule 6.4, "Undue Influence"; OSAA, Rules, Rule 8.3 "Age"; WHSAA, Rules, 6.3.0 "Age Requirements."

[18] "There is a legitimate state interest sustaining the [Age 19] rule – the safety of the younger players." *Arkansas Activities Ass'n v. Meyer*, 805 S.W.2d 58, 61 (Ark. 1991). See, also, *Baisden v. W. Va. Secondary Schs. Activities Comm'n*, 568 S.E.2d 32, 38 (W. Va. 2002), where the court upheld the application of the age rule to a student who was six

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2. *Eight Semester Rule*: The "Eight Semester Rule" levels the playing field by preventing the practice of "red shirting" students for athletic purposes. See, *Jones v. California Interscholastic Federation*, supra, 197 Cal. App. 3d 751, 758 (Cal. Ct. App. 1988); *Baisden v. W. Va. Secondary Schs. Activities Comm'n*, supra, 568 S.E.2d 32, 39 (W. Va. 2002).[19]

3. *Classification of Schools*: All of the *Amici* classify school members by student enrollment. The rationale of such classifications has been noted by at least one association.[20] The MSHSAA in an unreported state

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feet four inches tall, weighed 280 pounds, ran the forty-yard-dash in 5.3 seconds, and would compete in this contact sport against students approximately five years younger; stating: ***The safety of younger, smaller, more inexperienced students would be unreasonably compromised.***" (Emphasis added); and, *Pottgen v. MSHSAA*, 40 F.3d 926, 929 (8th Cir. 1994), where the court held that the age limit rule was an essential eligibility requirement in a high school interscholastic program designed to help reduce the competitive advantage flowing to teams using older athletes; protect younger athletes from harm; discourage student athletes from delaying their education to gain athletic maturity; and prevents over-zealous coaches from engaging in repeated red-shirting to gain a competitive advantage. The court stated, "***These purposes are of immense importance in any interscholastic sports program.***" (Emphasis added).

[19] In *Baisden v. W. Va. Secondary Schs. Activities Comm'n*, supra, 568 S.E.2d 32, 39 (W. Va. 2002), the court cited *Hamilton v. West Virginia Secondary Schools Activities Commission*, 386 S.E.2d 656 (W. Va. 1989), which described "red shirting" as follows: "Red-shirting is a practice of delaying a student's academic pace and postponing his initial participation in athletics to permit him to gain physical and athletic maturity before beginning the period of eligibility for competitive athletics . . . ***It is the cynical and pernicious manipulation of a student's academic standing for the derivative athletic glory of adults – over-zealous coaches and parents . . . It is a corrupt and mean-spirited practice.***" (Emphasis added).

[20] See, IHSAA, Rules & Regulations, Rule 2 – Classification: 2-1 School enrollment will be the initial basis for establishing classification. Decisions on final placement may include consideration of the following factors: 1. Minimizing loss of instructional time; 2. Reducing travel time and distance; 3. Facilitating equitable scheduling; 4. **Maximizing**

(Continued on following page)

trial court case articulated the "primary objectives for classifying schools in athletic competition" as being (a) to provide for more equitable competition in team activities; (b) to provide for more equity among schools competing in team and group activities; (c) to protect the physical welfare of students engaging in contact sports; and, (d) to expedite the administration of district and state events with a minimum of conflict with the academic program.[21]

Significantly, the plaintiff in the case, a student in a private school, challenging a possible change in the classification of the MSHSAA member school she attended, asserted among the reasons that her school should not be moved to a higher class, that her teammates and herself would be competing against "teams with more players, more depth, subjecting plaintiffs to an increased risk of injury."[22]

4. ***Undue Influence/Recruiting Rule:*** All of the *Amici* have an "undue influence" and/or recruiting rule.[23] Unlike the Sixth Circuit, courts in other jurisdictions have found that activities associations, and their member schools, have a substantial interest in protecting students

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attention to safety concerns relative to competitive scheduling and pairing. (Emphasis added).

[21] *Lauren Bax, et al. v. Missouri State High School Activities Association*, Circuit Court of Boone County, Missouri, Case No.: 02CV167612, pages 4-5.

[22] *Id.* at pages 3-4.

[23] See Undue Influence/Recruiting Rules: CHSAA, Constitution and Bylaws, Article 19, ByLaw 1900, "Recruiting"; IHSAA, Rules and Regulations, Rule 8-15; KSHSAA, Rules and Regulations Governing Grades 7-12, Rule 19, "Undue Influence"; MSHSAA, 2006-2007 Official Handbook, ByLaw "Undue Influence" 216, page 24; NSAA, Bylaws for All Activities. ByLaw 2.8, "Undue Influence"; NMAA, Rule 1.8, "Undue Influence"; OSAA, Rules, Rule 8.7 "Undue Influence"; WHSAA, General Member School Rules and Regulations, Undue Influence, 4.1.0.

from such recruiting and protecting other students from the effects of recruiting on the playing field.[24]

The interest of activity associations in securing student safety and welfare is paramount to association member schools, and establishes a clear "substantial interest" that needs no specific data; it is self evident and settled law. This "substantial interest" clearly meets the third prong of the intermediate scrutiny standard applied by the Sixth Circuit in the *Brentwood* decisions.

5. *Other Rules that Level the Playing Field*: All of the *Amici* have rules that require regular student attendance in school, domicile requirements to prevent transfers for athletic purposes between school years or between activity seasons, prescribe amateurism and limit monetary awards to students. The core philosophy behind these rules are that students play where they reside, they do not transfer for athletic reasons without suffering restrictions on their eligibility, play without monetary reimbursement, and coaches are restrained from offering inducements that would cause students to suffer loss of eligibility. These core standards are essential and interrelated to create the unique amateur school programs that are played across America under "Friday night lights."

CONCLUSION

A private school's determination to enter into a contract with a high school activity association and its participation in the democratic rule making process of such association constitutes a voluntary and knowing limit on

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[24] See, *Mississippi High Sch. Activities Ass'n v. Coleman*, 631 So. 2d 768 (Miss. 1994); *Kentucky High School Athletic Association v. Hopkins County Board of Education*, 552 S.W.2d 685, 687 (Ky. App. 1977); *Mozingo v. Oklahoma Secondary Sch. Activities Ass'n*, 575 P.2d 1379 (Okla. Ct. App. 1978); and, *In re United States ex rel. Missouri State High School Activities Assoc.*, 682 F.2d 147 (8th Cir. 1982)).

the scope of such private school's Constitutional rights to challenge the rules so promulgated. Further, the high school activity associations with both public and private school members have a "substantial interest" in fostering a level playing field for student competitors in high school activities.

For the reasons set forth above, the *Amici* submit that the petition for a writ of certiorari should be granted and the judgment of the Sixth Circuit should be reversed.

Dated: November 30, 2006.

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IN THE

Supreme Court of the United States

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION,

Petitioner,

v.

BRENTWOOD ACADEMY,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, OHIO HIGH SCHOOL ATHLETIC ASSOCIATION AND THE KENTUCKY HIGH SCHOOL ATHLETIC ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Amici will address the following question, which is framed in Petitioner's second reason for granting certiorari:

> "Whether competitive equity is a substantial state interest."

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INTEREST OF AMICUS CURIAE

The respective amici organizations are voluntary associations of high schools in each state that set forth a statement of the consensus of the opinion of its membership as to minimum standards such that athletic competition, which is adversarial by nature, can occur on a somewhat level playing field to accomplish the goal of reasonable, equitable and competitive environments. To that end, every association serves the common needs of member institutions for regulations of athletics while correlating their diverse interests. The mission of each amici is to promote uniformity, predictability and competitive equity in the application of eligibility rules and contests rules for athletic competition.[1]

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[1] "Pursuant to Rule 37.6 of the Rules of the Supreme Court of the United States, each amici state that no counsel for any party authored this brief in whole or in part, and no person or entity other than the amici and respective counsel make any monetary contributions to the preparation or submission of this brief", and pursuant to Rule 37.2(a) of the Rules of Supreme Court of the United States the amici state that consent by both parties to file this brief on behalf of Petitioner has been granted.

SUMMARY OF ARGUMENT

Competitive fairness is at the core of any truly competitive activity. As oxygen is the life-supporting element in our air, competitive equity is the life-supporting element of organized competitive athletics.

It is the amici believe that competitive equity is so obvious in the nature of competition that it does not require a record of evidence – it is self evident. That competitive equity is a substantial interest of the member schools of a state high school athletic associations is compelling in the fact that:

1. it is a universal value of school sports organization; and
2. it is found in the sports provided on other levels by other sponsors.

The amici submit that the Tennessee Secondary School Athletic Association's petition for a writ of certiorari should be granted and the judgment of the Sixth Circuit should be reversed.

ARGUMENT

I. WHY A "LEVEL PLAYING FIELD" MATTERS IN HIGH SCHOOL SPORTS - HOW ANTI-RECRUITING RULES HELP

The TSSAA has advanced three reasons for the promulgation of an anti-recruiting rule by its member schools and their constituents:

1.To maintain proper perspective – athletics subordinate to academics - in voluntary, competitive interscholastic athletic programs of its member schools.

In its first review of *Brentwood Academy v. TSSAA*, 180 F.3d 758 (6th Cir. 1999), the U.S. Court of Appeals for the Sixth Circuit accepted that the TSSAA membership has a substantial interest in this objective.

2.To protect student-athletes from exploitation.

In its second review of *Brentwood Academy v. TSSAA*, 442 F.3d 410, 426 (6th Cir. 2006) the Sixth Circuit held that the TSSAA membership also has a substantial interest in this second objective.

3.To promote a level playing field – competitive equity – among the member schools which sponsor interscholastic athletic programs.

In its second review, the Sixth Circuit's majority held that the TSSAA membership has a legitimate, but not substantial interest, in this third objective:

> "Carter testified at length about *how* the recruiting rule preserves competitive equity among schools... There is very little, if any, evidence, however, explaining *why* competitive equity is an important value in the first place. It may be true, as defendants claim in their brief, that "maintenance of fair competition among [the TSSAA's] members lies at the core of [the TSSAA's] reason for being," but simply saying this is so does nothing to demonstrate why such a "reason for being" is a substantial state

> interest. State actors may act out of a variety of interests, but only some are substantial. The defendants can cite to no evidence to support the notion that ensuring that high schools compete in interscholastic sports in an equitable manner is a substantial state interest, especially when coupled with the admittedly substantial interest of ensuring that athletics do not become more important than academics at the high school level. The district court was right that this interest, while legitimate, is not substantial." *Id* at 426-27 (emphasis added.)

Generally, the rules of voluntary, competitive high school sports and the reasons for those rules are less justiciable issues than policy issues for the participants to decide. Whether or not competitive equity is a legitimate and substantial interest of the schools of the TSSAA versus "merely" a legitimate interest, and whether or not a recruiting rule contributes to the cause of competitive equity, are not questions that belong in a court of law, but are really political in nature and are better resolved by a vote of the organization's voluntary membership than by votes of judges; and just because one voluntary member of an organization has strong feelings about something does not mean that member has grounds for filing a lawsuit and overturning the will of those who adopted the policy. HENRY MARK HOLZER, THE KEEPER OF THE FLAME (2006).

Competitive equity is so obvious in the nature of competition that it does not require a record of evidence. In the dissent to the Sixth Circuit's March 17, 2006 opinion, it is stated:

> "... it can hardly be argued that TSSAA needs to provide evidence for the obvious proposition that more evenly balanced high school football matches are in the public interest."

However, that is what the majority opinion appears to require. This brief provides the rationale, which the dissent recognized as self-evident, but the majority somehow doubted.

II. UNIVERSAL VALUE OF "COMPETITIVE EQUITY"

"When the ball goes up, the pitch is thrown, the whistle blows, or the gun sounds, the outcome should be in doubt." RICHARD A. RASMUSSEN, THE ROLE OF INTERCOLLEGIATE ATHLETICS IN THE ACADEMY – A CASE STUDY OF THE FORMATION OF THE UNIVERSITY ATHLETIC ASSOCIATION 124 (1997).

That competitive equity is a substantial interest of the member schools of a state high school association is compelling in the fact that (1) it is a universal value of school sports organizations across America, and (2) it is found in sports provided on other levels by other sponsors. Sports programs do not survive a season or two, much less a century, without the effort to provide fair competition.

In their book, Reclaiming the Game – College Sports and Educational Value, authors William G. Bowen and Sarah A. Levin write:

> "The hardest thing may be to acknowledge that the good of the whole is not served when teams representing one or two schools in a conference (a Princeton or a Williams) are too dominant for too long. No one wants athletes at such schools to do anything but try their hardest to win every time they compete. But some of the 'rules of engagement' may need to be reexamined to discourage the wrong forms of competition (for example, recruiting ever more specialized athletes) and to encourage situations in which the outcomes of contests are, in Rasmussen's nice phrase, 'always in doubt'." WILLIAM G. BOWEN & SARAH A. LEVIN, RECLAIMING THE

GAME – COLLEGE SPORTS AND EDUCATIONAL VALUES 259 (2003).

This important value is everywhere in sports, and it is most obvious in the fact that in almost every circumstance, schools are classified for state tournaments on the basis of enrollment. Schools of 100 students or fewer do not have a fair chance to succeed against schools of 1,000 students or more. If competitive equity was not an important value, classification on the basis of school size would not be almost universal across the country.

This essential, universal value is found in the on-the-field or court playing rules as well as off-the-field eligibility rules for students, and in both in-season and out-of-season contest and practice limitations.

The need to control student recruitment as a means of promoting competitive equity is also found throughout sports. The recurrent recruiting scandals of college athletics would be Exhibit A. The recurrent investigations of the TSSAA, MHSAA, OHSAA and similar organizations into athletic-motivated transfers and athlete recruitment would be Exhibit B.

In most jurisdictions including Michigan, Ohio and Kentucky, interscholastic athletics may be an important part of the high school experience, but they are neither part of the required curriculum of schools nor an extension of any curriculum course. In Ohio, unlike "the classroom", a student athlete may be suspended from her/his interscholastic sports team without any due process requirements. (See Ohio Rev. Code Ann. §3313.664) No student has a right to participate in extracurricular interscholastic competitive athletics. Interscholastic athletics are not curricular, or even co-curricular; they are extracurricular. (See for example

Reid v. Kenowa Hills, 261 Mich. App. 17 (2004) and *Burrows v. OHSAA*, 891 F.2d 122 (6th Cir. 1989))[2]

These programs are neither essential nor integral to all students' education, but have evolved over decades to become tools by which schools may reach and motivate young people to stay in school, enjoy school and perhaps do better academically than they otherwise might. The programs provide venues for schools to interact with their constituents about a wide variety of topics and build community spirit and loyalty.

Of course, if the playing field for teams is not close to level or if teams have no chance to win and they lose contest after contest year after year, the interscholastic program will not attract participants and spectators, and most of the value of these programs is lost to schools.

Competitive fairness is at the core of any truly competitive activity. It is why both teams in a football game have the same number of players on the field. It is why the goals at either end of a basketball court are the same height. It is why the professional football team with the worst record this fall will have the first draft pick in the spring. It is why every Major League baseball team is

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[2] In 2001, this Court characterized interscholastic athletics as an "integral" part of public education in Tennessee. [*Brentwood v. TSSAA*, 531 U.S. 288 at 299-300 (2001).] However, just as in Michigan, Ohio and Kentucky there is no state law or State Board of Education regulation in Tennessee requiring any school, public or private, to sponsor interscholastic athletic competition; and there is no state law or State Board of Education regulation requiring any student to participate in a school's interscholastic athletic program. But whether interscholastic athletics is an integral part of public education or not, once the high school decides to sponsor a program of interscholastic athletics, then the interests that are essential to the success of that program are *ipso facto* substantial state interests. And to the extent that this Court may regard interscholastic athletics as an "integral" part of public education in Tennessee, then it is beyond peradventure that the interests that are essential to the success of interscholastic athletic competition are just as "substantial" as the interests that are essential to the success of public education generally in Tennessee.

limited to the same number of players on its roster. It is why every runner in the Boston Marathon runs the same distance over the same course. It is why boxing and wrestling are divided by weight classes. It is why each player in a chess match gets the same amount of time between moves. It is why schools have "junior varsity" games, to allow the less skilled players to compete against players of similar skill levels.

To defend the need for competitive equity in school athletic programs is like defending the need for oxygen in our air. As oxygen is the life-supporting element of our air, competitive equity is the life-supporting element of organized competitive athletics.

Fortunately, there is not a single rule of any athletic organization that must carry the sole burden for promoting competitive equity. The many rules that are codified work together, each contributing a part of what is necessary to achieve the organization's important interests and the intended values of the program: fairness.

One of the rules which contributes significantly to this legitimate and substantial interests of high school athletic associations is the anti-recruiting rule of the TSSAA (and similar rules of the MHSAA, OHSAA and KHSAA).

The dissent in the second Sixth Circuit opinion (March 17, 2006) offers these insights into why the TSSAA membership has a substantial interest in competitive equity which is advanced by an anti-recruiting rule:

> • "Fierce competition among high schools for talented student-athletes, and the demand for success from fans and alumni, bring the potential for excess. As a result, athletic leagues comprised of educational institutions, such as TSSAA, have rules governing both the recruitment of student-athletes and the

> eligibility of student-athletes to participate in athletic contests."
>
> • "Enforcement of the recruitment rule in this case is also clearly warranted because, in the context of athletic competition, the rule is sufficiently related to legitimate public interests and narrowly tailored."
>
> • "It is an off-the-field regulation thought to enhance the quality of on-the-field competition by promoting equity in the relative strength of teams. The anti-recruiting rules, therefore, have ~~a clear~~ relationship, not 'little or no relationship' to participation in TSSAA."

The dissent clearly understood the facts of these universal truths existence: without a level playing field there would be no games and, notwithstanding this fact, there will always be those who seek to tip the balance of "competitive equity" in their favor. The collision course of these two truths leads to the inescapable final truth.

In his 2004 book The Cheating Culture, author David Callahan cites "the effects of inequality" as an important cause of the culture of cheating he describes. He provides evidence that because people perceive that things are not fair (people believe they are disadvantaged and that they do not have an equal chance in life), people believe they have license to ~~cheat, steal~~ and lie. DAVID CALLAHAN, THE CHEATING CULTURE – WHY MORE AMERICANS ARE DOING WRONG TO GET AHEAD 96 (2004).

Without a level playing field in life, bad things happen. Absent a level playing field in sports, similarly bad things happen.

The Sixth Circuit's decision, left unchanged, will foster and promote a cheating culture among high school athletics. If the member schools cannot protect their interest in equal and fair competition by voluntarily joining an association and enacting rules pursuant to an agreed upon political process, then the member schools

will have an incentive to cheat. In fact, by the Sixth Circuit stating that equal and fair competition is not a substantial interest, the member schools may even have a legal justification to cheat. Just as students are not allowed to cheat in the classroom to protect the substantial interest of fair and equal academic competition, schools and coaches should not be allowed to cheat to protect the substantial interest of fair and equal athletic competition. Otherwise, students are being taught that, while fairness and equality may be important, those pursuits are not important.

III. A SUBSTANTIAL INTEREST EXISTS TO ASSURE THAT COMPETITIVE EQUITY EXISTS AMONG COMPETITORS

> "A school's extracurricular activities constitute a part of a school's teaching mission, and the school accordingly must make decisions concerning the content of those activities . . . Absent good reason to hold otherwise, these decisions should be left to teachers." Quoted by Justice John Paul Stevens in *Board of Education v. Mergens*, 496 U.S. 226, 275 n.6 (1990).

The Sixth Circuit has the argument of the TSSAA that the schools of that association have a substantial interest in a "level playing field" for athletic competition. In substituting its opinion for that of the educators who make up the schools of the TSSAA, the two-judge majority opinion has departed from the long experience and best thinking of voluntary high school athletic associations across the country, as well as a wide variety of other athletic organizations in the United States. (See *Gutter v. Bollinger*, 539 U.S. 306, 328 [2003]; *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 273 [1988]; *Regents of the University of Michigan v. Ewing*, 4764 U.S. 214, 226 [1985]; *Wood v. Strickland*, 420 U.S. 308, 326

[1975] and *State ex. rel. Ohio High School Athletic Assoc v. Judges*, (1962) 173 Ohio St. 239.)

A. Earliest Eligibility Minimums

The history of high school athletics in Michigan, Ohio and Kentucky is not unlike that of Tennessee and most other states. One hundred years ago, when athletic programs were first becoming organized well enough in secondary schools to cause people to wonder how the students of one school might fare against the students of another school, it took but a few experiences of interscholastic competition to realize that a common set of understandings was necessary for the competition to occur with fair result and without hard feelings.

Those who were coordinating these first athletic exchanges quickly discovered that they needed several kinds of rules; and it was not left to a single rule or single kind of rule to promote competitive equity: it was one of the objectives of all of the rules which tended to work together toward the desired outcome of a more level playing field.

The first set of rules needed was to determine where and with what the competition would be conducted: facility dimensions, ball specifications, net heights, etc.

The second set of rules they found necessary was to determine how the competition would proceed: number of balls and strikes and innings, lengths of quarters, halves, etc.

These first and second sets of understandings show there was concern from the very first day of school sports for fairness, for a more level playing field, for competitive balance. The organizers could not have these valued qualities in their contests without these kinds of rules.

But deciding where, with what and how the competition would be played was not enough. Gradually, it became clear to the coordinators of the programs that there had to be some understandings, agreements, policies and rules about who could play.

Not surprisingly, School A soon objected if School B's participants in an event seemed to be men against School A's boys.

Thus, the schools coordinating the events agreed that all participants in all contests had to be enrolled in the schools they represented in competition. These agreements were made long before the amici organizations were formed, but an enrollment rule is still the first regulation of the amici rule books.

They further agreed next that all participants had to fall within a certain age range. An age rule. That is still the second regulation of the amici rule books.

It wasn't fair to have it any other way. Nor was it healthy for participants to have it any other way.

The state athletic associations have endured countless legal battles seeking to strike down these well-established and well-intended rules. For example, the MHSAA successfully defended its enrollment rule in lawsuit which tried to eliminate the enrollment requirement for some young people. See *Reid v. Kenowa Hills*, 261 Mich. App. 17 (2004).

In previous years, the MHSAA had to fight in several courts to keep its age rule. The rule has always prevailed successfully.

In *Cardinal Mooney High School v. MHSAA*, 437 Mich. 75, 82, 468 N.W.2d 21 (1991), the Supreme Court of Michigan held:

> ". . . the interest of uniformity and predictability justify even-handed application of" [the forfeiture rule] . . ."
>
> And
>
> "In light of the unique issues of competitive equity in the area of eligibility rules for athletic contests, [the forfeiture rule] is a valid regulation which neither infringes on the authority of the courts nor improperly restricts access to the judicial system."

It is apparent that schools' interests in having competitive equity for interscholastic athletics are both legitimate and substantial and form the basis for the Michigan Supreme Court upholding the rule in question.

Over the years, member schools of these associations have addressed a variety of eligibility issues that threatened the competitive balance necessary to conduct athletic contests with fair result and without hard feelings: maximum semesters, academic progress, transfers and undue influence (recruitment), for example.

But, if a court can conclude that fair and equal competition in this instance is not a substantial interest, then these other types of rules will undoubtedly be challenged on similar grounds. The state athletic associations must be permitted to enforce these rules or else chaos will reign among high school athletic competition.

B. Earliest Competition Maximums

As interscholastic athletic programs became more sophisticated and took on higher profile within the school, community and state, pressures mounted for athletic teams to do better and win more. As a result, some schools would start practice sooner, play more games and seek more distant and prestigious venues for competition.

Not surprisingly, again, it did not take very long for some schools to complain that other schools in pursuit of competitive advantage were moving toward excesses, were abusing the health and welfare of students and were interfering with the educational objectives of schools.

So again, through political process schools agreed among themselves on some limitations, for example, for the lengths of seasons, number of contests and distances of travel.

As the years have passed, school administrators have found it necessary to adopt starting and ending dates, as well as maximums for the number of interscholastic

scrimmages and contests, for each and every sport season in order to assure that:

- one sport did not conflict with other sports programs in the school;
- no sport interfered with other extracurricular activities of the school; and
- sports did not interfere with the academic mission of the school;

and through their voluntary association, these administrators found it necessary to agree upon statewide maximums in order to promote the important value of fair competition between schools.

School administrators have learned from experience that to maintain competitive equity, it is not only necessary to define the interscholastic season and limit what can occur during it, but also it is necessary to define and limit what can occur out of season. This has become increasingly challenging as school sports have expanded to include sports that were entrenched in community-run programs before they became school programs and as the coaching staffs of schools have had to expand beyond teaching faculty to adults in the community employed outside of schools.

Yet, the Sixth Circuit's decision may undo the years of progress that the schools have made toward putting the health, welfare and education of students above sports.

C. Annual Contract

In Michigan Ohio and Kentucky, schools make the rules for themselves. The rules cover hundreds of policies and procedures for administration of the local programs. Each year in Michigan and Ohio, the member schools renew their membership in the association by adoption by their respective Boards of Education and resolution not only renewing their members, but adopting as their own the same minimum eligibility requirements.

In addition, schools have the option to adopt rules of qualification into the postseason tournaments conducted

by the MHSAA. MHSAA rules – prepared by the elected representatives of member schools (Representative Council) – are not to govern regular season competition but to determine the qualifying standards for MHSAA sponsored and conducted postseason tournaments.

An important benefit is that by adopting these tournament-qualifying rules, schools gain a greater degree of standardization – a more level playing field – for their regular season competition.

For MHSAA member schools, these and other agreements are published in the *MHSAA Handbook*; and each year the local governing boards of member schools sign a Membership Resolution, a contract, that they will enforce those rules locally, while the MHSAA agrees that the rules will not be changed during that year.

Schools do so to keep the program fair. They do so to keep the program healthy for the people involved. They do so to keep the program consistent with the mission of the sponsors: namely, education of students by schools.

Rules do not exist for their own sake, but work in the aggregate to address known problems, to attempt to solve those problems in order to strive to provide the elusive product of a state high school association's work: competitive equity.

D. Current *Handbook*

The Foreword to the *Handbook* of the Michigan High School Athletic Association has for many years included these two paragraphs:

"The MHSAA's primary purpose in promulgation of rules for eligibility minimums and competition maximums is to establish conditions by which students and schools may qualify for MHSAA postseason tournaments – in other words, to promote a level playing field for MHSAA-sponsored tournaments.

"Because entry into the MHSAA's tournaments requires season-long, sometimes school year-long and even year-round adherence to basic rules, member

schools reap an important byproduct: they have some standardized rules for their regular season competition – in other words, a more level playing field for the rest of their interscholastic experience."

The *MHSAA Handbook* has for many years stated the four "Purposes of the Michigan High School Athletic Association, Inc." Included is this:

"3. Promote uniformity, predictability and competitive equity in the application of eligibility rules for athletic contests."

Similarly, promotion of competitive equity is in the stated or implied purpose for or value of the sponsoring organizations of school sports nationwide, including all those high school associations located within the United States Sixth Judicial Circuit.

E. Tournament Classification

It is generally accepted that the schools of Michigan were the first to be divided by school size for season-ending statewide tournaments. Over the years, the number of states with enrollment-based classifications for tournaments has grown to all 50, and the number of classifications within each state keeps increasing. The motivation is that schools value and keep looking for competitive equity – a fair and reasonable opportunity to succeed – in interscholastic athletic tournaments. The phenomenon of enrollment-based classifications for competition has even expanded to non-athletic tournaments and festivals, like band, orchestra, vocal music, speech and debate.

If competitive equity was not valued by the membership of these organizations, classifications would be unnecessary for their competitions. They most certainly would not be found in almost every high school sport in every state.

F. National Federation Playing Rules

The organization that prepares playing rules for most high school sports which govern the vast majority of

interscholastic games and meets is the National Federation of State High School Associations. Its rules committee members are provided a manual that lists ten principles of rules writing, the first and fourth of which are as follows:

"1. FAIR PLAY: The rules, first and foremost, must guarantee fair play. No competitor should gain an unfair advantage over an opponent as a result of a rule of play. This criterion is basic and transcends all other considerations."

"4. BALANCE BETWEEN OFFENSE AND DEFENSE: In all sports, a relationship must be maintained between the offense and defense enabling neither phase of the game to dominate the other."

In other words, fair and balanced competition are goals when promulgating the rules that govern on-field play. Off the field regulations regarding student eligibility and recruitment are no less important in establishing and maintaining competitive equity in school sports.

G. National Federation Eligibility Rules

The National Federation of State High School Associations has a set of eleven "Recommended Minimum Eligibility Standards" for its member high school associations across the country. The eleven include the following:

"9. RECRUITING/UNDUE INFLUENCE: Transfer from one school to another for athletic purposes because of undue influence by anyone connected directly or indirectly with the school shall cause a student to forfeit eligibility for at least one year from the date of enrollment."

Every member association of the National Federation has such a rule, attesting to the universal appreciation of the importance educators have placed on not only discouraging, but also strongly penalizing, recruiting/undue influence.

H. Essential Requirement

The membership of the Michigan High School Athletic Association has adopted a single regulation (Regulation I) with 13 interrelated sections identified as the "Essential Eligibility Requirements for Senior High School Students." One of those "essential" requirements is this:

> SECTION 10 – UNDUE INFLUENCE
>
> "SECTION 10 – The use of undue influence for athletic purposes by any person or persons directly or indirectly associated with the school to secure or encourage the attendance of a student or the student's parents or guardians as residents of the school district shall cause the student to become ineligible for a minimum of one semester and a maximum of one year. The offending school shall be placed on probation for one year and offending coach or coaches shall not be permitted to coach at that school for a one-year period and shall not coach for a one-year period at any other member school in any MHSAA tournament in any sport. Examples of undue influence would include but not be limited to offers of or acceptance of: financial aid to parents, guardians or student; reduced or eliminated tuition and/or fees; any special privileges not accorded to other students, whether athletes or not; transportation allowances; preference in job assignments; room, board or clothing; promotional efforts and admission policies for athletes which are in excess of efforts for other students."

Thirteen interpretations follow to assist in the application of this section.

What is especially noteworthy is that this particular section contains its own penalty. So serious is a transgression of undue influence – it is an error of

commission, not omission – that this section does not defer to the portion of the *Handbook* which deals with penalties (Regulation V). Instead, within the rule itself, it stipulates that, in addition to other penalties, this transgression will result in suspension of students and offending school personnel.

Undue influence does not receive a slap-of-the-hand penalty but the most serious penalties the MHSAA may assess, and represents one of the very few times the eligibility regulation will lead to suspension of the students or staff of member schools, actions usually reserved to the member schools themselves.

A violation of undue influence is a violation of the most serious kind, with specially identified penalties, because it most fundamentally challenges the program's effort to provide – and the member schools' great interest in – equitable competition, as level a playing field as possible, a core value of school sports.

I. Other Levels of Sports

As unique as interscholastic athletic programs are in their guiding philosophies and governing policies, their concern for promoting and protecting a level playing field - competitive equity – is not unique. The concern is found throughout sports of all kinds on all levels.

In Leveling the Playing Field, author Paul Weiler writes:

> ". . . the very existence of a game to play, let alone a championship to savor, requires that he participants cooperate off the field to create a fair and balanced match-up on the field.
>
> "That is way any sports venture must have a league or other body to establish rules for the game that make the contests challenging to players and attractive to spectators."

And

> "It is this intrinsic 'joint product' quality of sports that requires a central organization to set rules about who is eligible to play and how the available talent is to be distributed among teams to ensure balanced competition." PAUL WEILER, LEVELING THE PLAYING FIELD – HOW THE LAW CAN MAKE SPORTS BETTER FOR FANS 2-5 (2000).

Many professional sports leagues have salary caps and agreements to share broadcast and merchandise revenues as a way to level the playing field so the rich don't keep getting richer at the expense of the poorer. Frequently acknowledged as the best run and most successful professional sports league, the National Football League actually gerrymanders each season's schedule so the weaker teams play each other more frequently and the stronger teams less frequently. Their motives may be commercial more than educational, but they share the same interest: competitive equity.

CONCLUSION

Concern for fairness, for competitive equity or balance, for a more level playing field, is found in sports on all levels by all sponsors. Its meaning varies somewhat based on the purpose of the program – e.g., the commercial interests of major college and professional sports versus the educational interests of school sports or the recreational interests of community leagues – but there is a substantial interest at every level that rules be developed and applied that will tend to provide for a fair and sportsmanlike result. Without rules, a level playing field is unlikely. With rules of eligibility and competition, a level playing field is more possible.

Respectfully submitted,

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TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION,

Petitioner,

v.

BRENTWOOD ACADEMY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL FEDERATION OF STATE HIGH SCHOOL ASSOCIATIONS IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF AMICUS CURIAE

The National Federation of State High School Associations ("NFHS") is the national service and administrative organization of high school athletics.[1] Founded in 1920, the NFHS is composed of one high school athletic or activities association in each of the fifty states and the District of Columbia. About ninety percent of the high schools in the United States are members of state high school athletic or activities associations that are in turn members of the NFHS.

The NFHS's mission is to provide leadership and national coordination for the administration of interscholastic activities, including athletics. The NFHS works to enhance the educational experiences of high school students and to reduce the risks arising from their participation in interscholastic athletic programs. The NFHS strives to promote participation and sportsmanship, to develop good citizens through activities that provide equitable opportunities, and to maximize the achievement of educational goals. The objectives of the NFHS include the protection of interscholastic athletics and the development of solutions to problems related to interscholastic athletics at the high school level.

Based on the purposes underlying the NFHS and its objectives, the NFHS has a strong interest in whether

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[1] Pursuant to Supreme Court Rule 37.6, the *amicus* states that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than the *amicus*, its members, and its counsel, contributed monetarily to the preparation or submission of this brief. The parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.3, letters evidencing this consent have been filed with the Clerk.

recruiting for athletic purposes at the high school level can be properly regulated by state high school activities associations. If this Court does not reverse the judgment in favor of Plaintiff/Appellee Brentwood Academy on its First Amendment claim, the ability of state high school activities associations to regulate athletic recruiting, and to prevent the inequities that it engenders, will be significantly compromised.

SUMMARY OF ARGUMENT

Brentwood Academy's First Amendment challenge to the Anti-Recruiting Rule of the Tennessee Secondary School Athletic Association ("TSSAA") poses a nationwide threat to high school athletics. Every state high school athletic association in the United States forbids athletic recruiting at the high school level. These associations collectively consist of 18,654 schools and represent over seven million student athletes.

State associations prohibit recruiting for good reason. High school athletics are and should remain a source of pride and cohesion for student bodies, parents, and communities. Recruiting for athletic purposes threatens these goals by making competition unfair, in that it allows private schools to entice superior athletes from wide geographic areas, while the public schools against which they compete are largely limited to students within defined geographic boundaries.

The Sixth Circuit's ruling limiting enforcement of the TSSAA Anti-Recruiting Rules has implications for high schools nationwide. The ruling will potentially have a chilling effect on the enforcement of comparable rules in

other states. It threatens the current competitive balance between private and public schools, and promises to increase dissension among them. And by allowing anti-recruiting challenges on a case-by-case basis, it encourages litigation and harms the finances of state high school athletic associations.

Fairness in athletic competition supports quality academics; unfairness works the opposite result. The current state of American intercollegiate athletics, where recruiting is rampant, shows the unfortunate consequences of the Sixth Circuit's ruling promoting high school recruiting. Too many Division I college athletic programs have strayed from their educational missions and brought discredit to their institutions. There is no reason to believe that allowing high school recruiting would produce a happier result. By allowing Brentwood to circumvent the anti-recruiting rules to which it agreed, the Sixth Circuit has set an unfortunate precedent that high schools nationwide will be tempted to follow. An unfair competitive environment – which recruiting encourages – will harm American secondary education.

ARGUMENT

The NFHS believes that the primary mission of United States high schools should be to foster academic education. While the NFHS views cocurricular activities[2]

[2] The phrase "extracurricular activities" is commonly used to refer to activities that supplement the academic aspect of high school education. Many educators, however, prefer the use of the term "cocurricular activities" based on their belief that such activities, when

(Continued on following page)

like athletics as an integral part of the high school experience, those activities should remain consistent with the schools' academic missions. The recruiting encouraged by the Sixth Circuit's decision would change the existing balance between athletics and academics, and would undermine the sense of community that gives a uniquely local character to high school sports.

I. The Uniform Enforcement of the Anti-Recruiting Rules is Important to High School Athletics.

State high school governing bodies are comprised of professional educators, most of whom are school principals. The fact that these educators have uniformly and consistently enacted anti-recruiting rules is telling. As the NFHS 2006-07 Handbook explains in identifying reasons to limit high school recruiting:

> A recruiting/undue influence prohibition discourages exploitation of students; prevents over-emphasis of athletics; gives average student-athletes more opportunity to participate; discourages adults from jeopardizing students' eligibility; and prevents misuse of athletic programs.

NATIONAL FEDERATION OF STATE HIGH SCHOOL ASSOCIATIONS, 2006-07 HANDBOOK 20 (2006).

Competitive equity is essential to interscholastic athletics. This fact is recognized by many, from children who alternate picking team members to professional sports teams that have draft and salary restrictions.

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kept in their proper context, are inherently educational and support the academic mission of schools.

"[T]he very existence of a game to play, let alone a championship race to savor, requires that the participants cooperate off the field to create a fair and balanced match-up on the field." PAUL C. WEILER, LEVELING THE PLAYING FIELD 2 (2000).

Competitive equity is also essential to further classroom education. In fact, athletics are an extension of the classroom. The TSSAA Constitution recognizes that, "the primary objective of all secondary schools is to educate youth" and that "the athletic field and the gymnasium are classrooms in which teaching is foremost in the development of character, integrity, sportsmanship, and teamwork." If students realize that competition is unfair, the educational value of the competition is compromised. Indeed, students will eventually stop participating if they believe competition is futile. Jack Roberts, the Executive Director of the Michigan High School Athletic Association, testified below that an anti-recruiting rule is necessary to produce a fair competitive environment because without it, students who lose games consistently will lose the willingness to compete. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 304 F.Supp.2d 981, 993 (M.D. Tenn. 2003), *rev'd in part on other grounds*, 442 F.3d 410 (6th Cir. 2006). The anti-recruiting rules preserve competitive equity and enhance American high school students' athletic experiences. Without anti-recruiting rules, competitive equity would be diminished, and America's secondary educational system would be damaged.

The Court has already recognized that high school athletic programs play an "integral" role in secondary schools. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 289 (2001). Recruiting weakens this integral role because it undermines the fairness of

competition. It also displaces students who have worked their way up to team membership, or even starting positions, at their schools. That displacement can in turn lead to disharmony among students, a fracturing of school spirit, and eventually to a loss of community support for interscholastic activities. Recruitment can also tempt schools to compete rather than educate by drawing coaches away from their teaching responsibilities, and by encouraging them to pursue students solely for non-academic purposes.

The Court should review the Sixth Circuit's opinion to assess the wisdom of its decision to allow high school recruiting to expand.

II. Anti-Recruiting Rules Are Important to NFHS Members.

Anti-recruiting rules are also vital to NFHS members. Though each of the 50 states and the District of Columbia has an athletics or activities association, participation by private schools in these associations is entirely voluntary. Some private schools, including prominent ones like Oak Hill Academy in Virginia and Mount Zion Academy in North Carolina, choose not to join state high school associations because they do not want to be bound by the associations' rules. While these schools have successful athletic programs, they deliberately forego the opportunity to compete in state championships in return for other benefits, particularly the ability to recruit freely. Here, however, Brentwood chose to join the TSSAA in order to compete against other TSSAA schools. In so doing, it contractually agreed to be bound by that organization's rules of competition, including the anti-recruiting rule.

Waiving the right to recruit is a reasonable restriction to which Brentwood and TSSAA were free to agree.

If anti-recruiting rules may no longer be enforced, the fragile competitive balance between high schools, both public and private, will be disturbed, and the dissension between them can only increase. If high school recruiting is expanded, public and private schools would no longer be fairly competing. Public schools would be disadvantaged because they could not recruit beyond their geographical boundaries, and private schools would be disadvantaged because public schools would resist competing against them. This result is not constitutionally necessary and can only be avoided if this Court intervenes.

The Sixth Circuit's decision also threatens the finances of NFHS members. The decision encourages future litigation because the court essentially analyzed whether Brentwood's violation of the anti-recruiting rule was somehow harmless. In doing so, the Sixth Circuit ignored the Court's precedent instructing that the correct inquiry is not whether the rule's purposes are promoted when applied to a particular plaintiff, but whether the rule is justified by substantial state interests. *See Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 468 (1978). Under the Sixth Circuit's approach, anti-recruiting rules lose their deterrent effect because parties are allowed to challenge whether enforcement in *particular cases* furthers the purposes of the rules. Because state athletics organizations have limited financial means, any threat of litigation will have a chilling effect on their investigation and enforcement of their rules. Review is warranted for this reason as well.

III. Recruiting Has Already Harmed Intercollegiate Athletics, and Promises To Harm High School Athletics As Well.

The college experience foretells the perils awaiting high schools if recruiting is expanded. Instead of supporting academic achievement, big-time college athletics are too often driven by winning and revenue generation. And recruiting is at the core of the problem.

In 1989, the Knight Commission, which is composed of high-ranking educational and athletic leaders, concluded that so many abuses existed in college athletic recruiting that the balance between college academics and college athletics was all but lost. Knight Commission on Intercollegiate Athletics, *Keeping Faith with the Student Athlete: A New Model for Intercollegiate Athletics.*[3] The Knight Commission reconvened in 2001 and determined that despite considerable effort, the problem had worsened. Knight Commission on Intercollegiate Athletics, *A Call To Action: Reconnecting College Sports and Higher Education.*[4]

Others have recognized the adverse effects of recruiting on college students:

> Recruited athletes earn far lower grades than what might be expected on the basis of their incoming academic credentials and demographic characteristics. This striking "underperformance" phenomenon appears to be related directly to the

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[3] http://www.knightcommission.org/about/keeping_faith_download_a_pdf_of_this_publication/ (March 1991).

[4] http://www.knightcommission.org/about/reports/category/A%20Call%20to%20Action/ (June 2001).

> criteria used in recruiting and admitting these athletes – and not to time commitments, differences in race or socioeconomic status, field of study, or the intensity of the athletic experience. Recruited athletes underperform even in seasons or years when they are not participating in athletics.

WILLIAM G. BOWEN & SARAH H. LEVIN, RECLAIMING THE GAME: COLLEGE SPORTS AND EDUCATIONAL VALUES 328 (2003). The profound impact recruiting has had at the collegiate level has even caught the attention of the United States Congress. In 2004, a House of Representatives subcommittee conducted a hearing entitled "College Recruiting: Are Student Athletes Being Protected?" *See The Committee on Energy & Commerce, College Recruiting: Are Student Athletes Being Protected?*[5]

Recruiting at the college level is not only at odds with the fundamental academic mission of American schools, but it can injure students in other ways:

> This evidence [from Bowen and Levin's book *Reclaiming the Game*] suggests that intercommunity recruiting can pollute the educational value of the interscholastic athletic environment by sending the message to students that the external, competitive value of athletics in the form of glory and profit is more valuable to the student than the student's internal academic and social development. This evidence suggests that intercommunity recruiting can pollute students by sending the message that developing one's athletic assets (which for all but a tiny percentage of

[5] http://energycommerce.house.gov/108/Hearings/03112004hearing1226/hearing.htm (March 11, 2004).

> students are wasting assets) for consumption by others is more valuable to the student than developing one's academic and social assets (which for all students are appreciating assets) for one's own personal growth and benefit.

Kevin P. Braig, *A Game Plan To Conserve the Interscholastic Athletic Environment After Lebron James*, 14 MARQ. SPORTS L.J. 343, 357 (2004).

High school students who are recruited based on athletic prowess may similarly develop a false sense of superiority and an identity based only in athletics. The reality is that less than one percent (1%) of high school athletes will ever reach the professional ranks. Because of over-emphasis on their athletic abilities, many of these athletes, once denied a career in professional sports, may lack the academic tools they need to succeed in society.

Anti-recruiting rules can help lessen the tendency of top athletes to view sports as the only important part of their lives, a view that can lead to the use of performance-enhancing drugs, over-use injuries, missed classes, and premature specialization in a single sport. The rules can also restrain adults who seek their own financial gain or recognition by exploiting student-athletes.

The problems with high school athletic recruiting do not end here – the above examples are merely illustrative. High school educators prohibit recruiting for good reason, and the courts should support rather than hinder their efforts whenever possible.

CONCLUSION

High school athletic competition in our country has a proud tradition, one the NFHS wants to preserve. Recruiting is antithetical to high school educational athletics. It is at odds with the primary academic mission of American high schools. The Sixth Circuit's opinion limiting enforcement of high school anti-recruiting rules is a step backward in American education. The petition for writ of certiorari should be granted.

Respectfully submitted,

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3/20/07

No. 06-427

In the Supreme Court of the United States

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION,
PETITIONER,
v.
BRENTWOOD ACADEMY,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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ITEMS PREVIOUSLY REPRODUCED

In accordance with Supreme Court Rule 26.1, the following items have been omitted in printing this joint appendix because they appear on the following pages of the appendix to the Petition for a Writ of Certiorari (Sept. 25, 2006)

Opinion, *Brentwood Academy v. Tennessee Secondary School Athletic Association*, No. 98-6113 (6th Cir. Aug. 23, 2001) 1a

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RELEVANT DOCKET ENTRIES

U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 98-6113

8/21/98 Civil Case Docketed. Notice filed by Appellant TN Secondary School, Appellant Ronnie Carter. Transcript needed: y • (yh)

8/21/98 Appellant MOTION filed to expedite appeal. Motion filed by Richard L. Colbert and Charles Hampton White for Appellant Ronnie Carter, Appellant TN Secondary School. Certificate of service date 8/7/98 [98-6113] (yh)

8/25/98 BRIEFING LETTER SENT setting briefing schedule: appellant brief due 9/17/98; appellee brief due 10/13/98; reply brief due 10/27/98; appendix due 11/2/98; final briefs due 11/16/98. . (yh)

* * *

8/26/98 TRANSCRIPT ORDER FORM filed by Richard L. Colbert for Appellant Ronnie Carter, Appellant TN Secondary School: Transcript not needed. [98-6113] [1790733-1] (blh)

* * *

9/21/98 PROOF BRIEF filed by Richard L. Colbert for Appellants Ronnie Carter, TN Secondary School. Certificate of service date 9/17/98. Number of Pages: 53. [98-6113] • (teb)

9/21/98 Request to require oral argument filed by Richard L. Colbert for Appellants Ronnie Carter, TN Secondary School [98-6113] (teb)

9/30/98 MOTION filed to allow National Federation of State High School Associations to become an amicus curiae . Motion filed by John J. Kitchin for Natl Fedn St High. Certificate of service date 9/24/98 . [98-6113] (yh)

* * *

9/30/98 AMICUS BRIEF TENDERED. Received from John J. Kitchin for Natl Fedn St High [98-6113] . Certificate of service date 9/24/98 (yh)

10/15/98 PROOF BRIEF filed by William Scott Sims, James F. Blumstein and G. Thomas Nebel for Appellee Brentwood Academy. Certificate of service date 10/13/98. Number of Pages: 119. [98-6113] • (teb)

10/15/98 Request to require oral argument filed by William Scott Sims, James F. Blumstein and G. Thomas Nebel for Appellee Brentwood Academy [98-6113] (teb)

10/15/98 BRIEFING LETTER SENT requesting brief corrections from William Scott Sims, James F. Blumstein, G. Thomas Nebel because of summary of argument, font, pagination. Corrections due: 10/29/98, resetting briefing schedule: appellee brief now due 10/29/98; appendix now due 11/19/98; appellant final brief due now 12/10/98; appellee final brief now due 12/10/98 [98-6113] (teb)

11/2/98 Corrected appellee proof brief filed by William Scott Sims, James F. Blumstein, G. Thomas Nebel. Copies: 1. Certificate of Service date 10/29/98 [98-6113] (teb)

11/13/98 AMICUS BRIEF TENDERED. Received from Steven L. Craig for OH High School Ath, Edmund J. Sikorski for MI High School [98-6113] . Certificate of service date 11/12/98 Corrections to be made: ; (yh)

11/16/98 PROOF REPLY BRIEF filed by Richard L. Colbert and Charles Hampton White for Appellants Ronnie Carter, TN Secondary School. Certificate of service date 11/12/98 [98-6113] (teb)

11/17/98 MOTION filed to allow KY High School Athletic Assoc to become an amicus curiae . Motion filed by Danny C. Reeves for KY High School. Certificate of service date 11/16/98 . [98-6113] (yh)

11/17/98 MOTION filed to allow MO State High School Assoc to become an amicus curiae . Motion filed by Mallory V. Mayse for MO High School. Certificate of service date 11/16/98 . [98-6113] (yh)

11/18/98 AMICUSBRIEF TENDERED. Received from Danny C. Reeves for KY High School [98-6113] . Certificate of service date 11/16/98 Corrections to be made: ; (yh)

11/18/98 AMICUS BRIEF TENDERED. Received from Mallory V. Mayse for MO High School [98-6113] . Certificate of service date 11/16/98 Corrections to be made: ; (yh)

11/23/98 APPENDIX filed by Charles Hampton White for Appellants Ronnie Carter, TN Secondary School. Copies: 5 (8 Volumes). Certificate of service date 11/19/98 [98-6113] (ds)

11/27/98 Appellee RESPONSE opposition filed regarding a motion to allow amicus curiae to appear filed by Danny C. Reeves, Mallory V. Mayse, and John J. Kitchin . Response from H. Lee Barfield for Appellee Brentwood Academy, G. Thomas Nebel for Appellee Brentwood Academy. Certificate of service date 11/24/98 [98-6113] (yh)

12/3/98 Appellant REPLY in response to the opposition to motion to file amicus briefs. Response from Richard L. Colbert for Appellant Ronnie Carter, Appellant TN Secondary School, Charles Hampton White for Appellant Ronnie Carter, Appellant TN Secondary School . Certificate of service date 12/2/98 . [98-6113] (yh)

12/7/98 Memorandum in support of motion by Missouri High School Activities Association to appear as amicus curiae filed by Mallory V. Mayse. Certificate of service date 12/3/98 [98-6113] (yh)

* * *

12/9/98 MOTION filed to allow Florida High School Activities Assocication to become an amicus curiae . Motion filed by Leonard E. Ireland for Fl High School Assoc. Certificate of service date 12/8/98 . [98-6113] (yh)

12/9/98 AMICUS BRIEF TENDERED. Received from Leonard E. Ireland for Fl High School Assoc [98-6113] . Certificate of service date 12/8/98 (yh)

12/10/98 MOTION filed to allow Illinois High School Assoc to become an amicus curiae . Motion filed by Terrence E. Kiwala for Il High School Assoc. Certificate of service date 12/9/98 . [98-6113] (yh)

12/10/98 AMICUS BRIEF TENDERED. Received from Terrence E. Kiwala for Il High School Assoc [98-6113] . Certificate of service date 12/9/98 (yh)

12/14/98 FINAL BRIEF filed by William Scott Sims, James F. Blumstein, H. Lee Barfield and G. Thomas Nebel for Appellee Brentwood Academy. Copies: 7. Certificate of service date 12/10/98. Number of Pages: 121. [98-6113] (teb)

12/14/98 FINAL BRIEF filed by Richard L. Colbert and Charles Hampton White for Appellants Ronnie Carter, TN Secondary School. Copies: 7. Certificate of service date 12/10/98. Number of Pages: 58. [98-6113] (teb)

12/14/98 FINAL REPLY BRIEF filed by Richard L. Colbert and Charles Hampton White for Appellants Ronnie Carter, TN Secondary School.

Copies: 7 Certificate of service date 12/10/98. Number of Pages: 31. [98-6113] (teb)

12/21/98 Appellee RESPONSE in opposition to the motion to allow Florida and Illinois High School Athletic Assoc, Kentucky, Michigan, Missouri and Ohio High School Athletic Associations to appear as amicus curiae. Response filed by H. Lee Barfield for appellee. [1855786-1] ; Certificate of service date 12/17/98 [98-6113] (yh)

12/29/98 Appellant REPLY to appellees' opposition to the motions to allow amicus to appeal previously filed by Terrence E. Kiwala,et al. Response from Richard L. Colbert and Charles Hampton White for Appellants. Certificate of service date 12/28/98 . [98-6113] (yh)

2/9/99 Oral argument date set for April 23, 1999 in court room 607. Notice of argument sent to counsel. [98-6113] (rld)

4/15/99 ORDER filed granting motion to allow amicus curiae to appear [1855786-1] filed by Terrence E. Kiwala Leonard E. Ireland Jr., Danny C. Reeves, Mallory V. Mayse and John J. Kitchin [98-6113] . . (yh)

4/15/99 BRIEF filed by Steven L. Craig for Amicus Curiae OH High School Ath, Edmund J. Sikorski for Amicus Curiae MI High School. Copies 5. Certificate of service date 11/12/98 . Number of Pages: . [98-6113] (yh)

4/15/99 BRIEF filed by Terrence E. Kiwala for Amicus Curiae Il High School Assoc. Copies 5. Certificate of service date 9/12/98 [98-6113] (yh)

4/15/99 BRIEF filed by Mallory V. Mayse for Amicus Curiae MO High School. Copies 5. Certificate of service date 12/16/98 . Number of Pages: . [98-6113] (yh)

4/15/99 BRIEF filed by Leonard E. Ireland for Amicus Curiae Fl High School Assoc. Copies 5. Certificate of service date 12/8/98 [98-6113] (yh)

4/15/99 BRIEF filed by Danny C. Reeves for Amicus Curiae KY High School. Copies 5. Certificate of service date 11/16/98 . . [98-6113] (yh)

4/15/99 BRIEF filed by John J. Kitchin for Amicus Curiae Natl Fedn St High. Copies 5. Certificate of service date None . Number of Pages: . [98-6113] (yh)

4/23/99 CAUSE ARGUED on 4/23/99 by Charles Hampton White for Appellant Ronnie Carter, Appellant TN Secondary School, James F. Blumstein for Appellee Brentwood Academy before Judges Guy, Suhrheinrich, Gilman. [98-6113] (me)

4/30/99 Appellee MOTION filed to file supplemental brief . Motion filed by William Scott Sims, James F. Blumstein and H. Lee Barfield for Appellee Brentwood Academy. Certificate of service date 4/29/99 . [98-6113] (yh)

5/6/99 Appellant RESPONSE opposition filed regarding a motion to file supplemental brief previously filed by William Scott Sims, James F. Blumstein, and H. Lee Barfield II . Response from Richard L. Colbert for Appellant Ronnie Carter, Appellant TN Secondary School, Charles Hampton for Appellant Ronnie Carter, Appellant TN Secondary School Certificate of service date 5/4/99 . [98-6113] (yh)

5/18/99 RULING granting motion to file supplemental brief [1937090-1] filed by William Scott Sims, James F. Blumstein, H. Lee Barfield II [98-6113] . (yh)

5/18/99 Supplemental brief filed by James F. Blumstein for Appellee Brentwood Academy, H. Lee Barfield for Appellee Brentwood Academy, G. Thomas Nebel for Appellee Brentwood Academy. Copies: 4. Certificate of service date 4/29/99 . Number of Pages: 40 Includes exhibits [98-6113] (yh)

* * *

6/21/99 OPINION filed: The district court's grant of summary judgment in favor of Brentwood is REVERSED: The injunction is VACATED and the case is remanded for further proceedings consistent with this opinion. decision for publication pursuant to local rule 206 [98-6113]. Ralph B. Guy, Richard F. Suhrheinrich, Ronald L. Gilman, Authoring Judges . (yh)

6/21/99 JUDGMENT: VACATED, REVERSED and remanded . (yh)

* * *

7/6/99 PETITION for en banc rehearing filed by William Scott Sims , James F. Blumstein and G. Thomas Nebel for Appellee Brentwood Academy. Certificate of service date 7/2/99. [98-6113] (blh)

7/21/99 LETTER SENT by blh to Richard L. Colbert for Appellants Ronnie Carter, TN Secondary School notifying that party is directed to respond to a petition for en banc rehearing [1974689-1] filed by William Scott Sims, James F. Blumstein and G. Thomas Nebel. Response due by 8/4/99. [98-6113] . (blh)

7/23/99 MOTION filed to allow Chester E. Finn and Daniel Casse leave to file an amicus brief in support of appellee's petition for rehearing en banc. Motion filed by Daniel Casse for Daniel Casse, Chester E. Finn for Chester E. Finn. Certificate of service date 7/22/99. [98-6113] (blh)

7/23/99 TENDERED : brief of amicus curiae in support of appellee's petition for rehearing en banc from Daniel Casse for Daniel Casse and Chester E. Finn for Chester E. Finn [98-6113] (blh)

7/29/99 Appellant RESPONSE in opposition to motion of Chester E. Finn and Daniel Casse for leave to file an amicus brief in support of appellee's petition for rehearing en banc [1984674-1] filed by Daniel Casse and Chester E. Finn Jr. . Response from Richard L. Colbert and Charles Hampton White for Appellants Ronnie Carter, TN Secondary

School. Certificate of service date 7/27/99. [98-6113] (blh)

8/2/99 ORDER filed denying as untimely the motion for leave to file an amicus brief in support of appellee's petition for rehearing en banc [1984674-1] filed by Daniel Casse, Chester E. Finn Jr. pursuant to Rule 29(e), Federal Rules of Appellate Procedure. The amicus brief submitted by Finn and Casse is not accepted for filing. [98-6113] . Entered by order of the court. (blh)

8/4/99 RESPONSE to a petition for en banc rehearing [1974639-1] filed by William Scott Sims, James F. Blumstein, and G. Thomas Nebel. Response filed by Richard L. Colbert and Charles Hampton White for Appellants Ronnie Carter, TN Secondary School. Certificate of service date 8/3/99. [98-6113] (blh)

8/6/99 ADDITIONAL CITATION in support of the petition for rehearing en banc filed by Wm. S. Sims for Appellee Brentwood Academy. Certificate of service date 8/5/99 [98-6113] (blh)

8/9/99 Appellant RESPONSE in opposition filed regarding the document filed 8/6/99 as an additional citation. Response from Richard L. Colbert for Appellants Ronnie Carter, TN Secondary School. Certificate of service date 8/6/99. [98-6113] (blh)

8/12/99 Appellee MOTION filed to reconsider order dated 8/2/99 denying as untimely the motion filed by Daniel Casse and Chester E. Finn, Jr., for leave to

file an amicus brief in support of appellee's petition for rehearing en banc. Motion filed by William Scott Sims , James F. Blumstein and G. Thomas Nebel for Appellee Brentwood Academy. Certificate of service date 8/11/99 . [98-6113] (blh)

8/18/99 ORDER filed denying motion to reconsider order of 8/2/99 denying as untimely the motion filed by Daniel Casse and Chester E. Finn, Jr. for leave to file an amicus brief in support of appellee's petition for rehearing en banc [1995718-1] filed by William Scott Sims, James F. Blumstein and G. Thomas Nebel [98-6113]. Entered by order of the court. (blh)

8/30/99 ORDER filed denying petition for en banc rehearing [1974689-1] filed by William Scott Sims, James F. Blumstein, and G. Thomas Nebel [98-6113]. Ralph B. Guy, Richard F. Suhrheinrich, Ronald L. Gilman, Circuit Judges. Judge Merritt separate statement on denial of en banc in which Judge Clay joined. (blh)

9/8/99 MANDATE ISSUED with no cost taxed [98-6113] (yh)

12/8/99 U.S. Supreme Court notice filed regarding petition for writ of certiorari filed by Appellee Brentwood Academy . Filed in the Supreme Court on 11-29-99 , Supreme Ct. case number: . [98-6113] (swh)

2/25/00 U.S. Supreme Court letter filed: Motion of Memphis University School, et al. for leave to file a brief as amicus curiae is granted;the motion of petition for summary refersalis denied; petition for

writ of certiorari granted [2063033-1] filed by Brentwood Academy [98-6113] . Filed in the Supreme Court on 02-22-00 . (swh)

7/14/00 U.S. Supreme Court letter filed requesting the certified record of proceedings in the U.S. Court of Appeals for the Sixth Circuit and transission of the distrit court record to the Supreme Court . [98-6113] (swh)

2/22/01 U.S. Supreme Court opinion filed: REVERSED [98-6113] and REMANDED [98-6113] . Filed in the Supreme Court on 02-20-01 . (swh)

3/26/01 U.S. Supreme Court judgment filed : REVERSED and REMANDED. Costs to be recovered by Brentwood Academy in the amount of $1,909.00. [98-6113] . Filed in the Supreme Court on 03-22-01 . (swh)

4/17/01 LETTER SENT by Clerk to Charles Hampton White and James F. Blumstein directing each of them to file a supplemental brief (original & 4 copies) not to exceed 5,000 words with this office not later than the close of business on Monday, May 7, 2001. supplemental brief . (yh)

4/30/01 Joint MOTION filed to extend time to file brief . Motion filed by Richard L. Colbert for Appellants, James F. Blumstein and Appellee [98-6113] (yh)

5/3/01 RULING granting motion to extend time to file supplemental briefs filed by Richard L. Colbert and James F. Blumstein The supplemental briefs are now due now 6/11/01. (yh)

6/11/01 Supplemental brief filed by James F. Blumstein, H. Lee Barfield and G. Thomas Nebel for Appellee Brentwood Academy. Copies: 7. Certificate of service date 6/11/01. [98-6113] (yh)

6/11/01 Supplemental brief filed by Richard L. Colbert for Appellants Ronnie Carter, TN Secondary School. Copies: 4. Certificate of service date 6/8/01 . [98-6113] (yh)

6/12/01 Appellee MOTION filed to allow the parties to present additional oral argument in connections with the supplemental briefs on remand. [2371997-1] . Motion filed by H. Lee Barfield for Appellee Brentwood Academy. Certificate of service date 6/11/01 . [98-6113] (yh)

* * *

7/5/01 LETTER SENT by yh granting motion for oral argument in connectioni with the filing of the supplemental briefs filed by H. Lee Barfield II [98-6113] (yh)

7/19/01 CAUSE ARGUED on 7/19/01, (via telephone), by Richard L. Colbert for Appellant Ronnie Carter, Appellant TN Secondary School, James F. Blumstein for Appellee Brentwood Academy before Judges Guy, Suhrheinrich, Gilman. [98-6113] (lkm)

8/2/01 ADDITIONAL CITATIONS filed by Richard L. Colbert for Appellants Ronnie Carter and TN

Secondary School. Certificate of service date 7/31/01 [98-6113] (yh)

8/7/01 Appellee RESPONSE in opposition to appellant's additional citations. Response from James F. Blumstein and H. Lee Barfield. Certificate of service date 8/6/01 [98-6113] (yh)

8/23/01 OPINION filed: REVERSED the judgment of the district court and remanded for further proceedings consistent with this opinion, pursuant to U.S. Supreme Court Judgment, decision for publication pursuant to local rule 206 [98-6113] Ralph B. Guy, Richard F. Suhrheinrich, Circuit Judges, Ronald L. Gilman, Authoring Judge. (yh)

8/23/01 JUDGMENT FILED: REVERSED and remanded . (yh)

9/6/01 ADDITIONAL PETITION for en banc rehearing filed by James F. Blumstein for Appellee Brentwood Academy. Certificate of service date 9/5/01. [98-6113] (blh)

10/29/01 ORDER filed denying petition for en banc rehearing [2419546-1] filed by James F. Blumstein [98-6113]. Ralph B. Guy, Richard F. Suhrheinrich, Ronald L. Gilman, Circuit Judges. (blh)

12/3/01 MANDATE ISSUED with no cost taxed [98-6113] (yh)

2/4/02 U.S. Supreme Court notice filed regarding petition for writ of certiorari filed by Appellee Brentwood Academy . Filed in the Supreme Court on 01 ,

Supreme Ct. case number: 01-28-02 . [98-6113] (swh)

4/12/02 U.S. Supreme Court letter filed denying petition for writ of certiorari [2498201-1] filed by Brentwood Academy [98-6113] . Filed in the Supreme Court on 04-01-02 . (swh)

U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT

NOS. 03-5245, 03-5278

2/25/03 Civil Case Docketed. Notice filed by Appellants TSSAA, Ronnie Carter. Transcript needed: y • (mcp) [03-5245]

2/26/03 Mediation Office is involved in this appeal. [03-5245] (trm) [03-5245]

* * *

3/5/03 Civil Case Docketed. Notice filed by Appellee Cross-Appellant Brentwood Academy. Transcript needed: y • (mcp) [03-5278]

3/6/03 TRANSCRIPT ORDER FORM filed by Richard L. Colbert for Appellant Ronnie Carter, Appellant TSSAA: court reporter Jim Spence, transcript ordered on 03/03/03 [03-5245] [2705524-1] response due by 3/17/03 for Jim Spence [03-5245] (blh) [03-5245]

* * *

3/10/03 PRE-ARGUMENT STATEMENT filed by Richard L. Colbert for Appellants Ronnie Carter, TSSAA in 03-5245. [03-5245] (mcp) [03-5245]

3/10/03 Mediation Office is involved in this appeal. [03-5278] (trm) [03-5278]

* * *

3/19/03 PRE-ARGUMENT STATEMENT filed by James

F. Blumstein for Appellee Cross-Appellant Brentwood Acad in 03-5278 [03-5278] (mcp) [03-5278]

3/19/03 TRANSCRIPT ORDER FORM filed by H. Lee Barfield for Appellee Cross-Appellant Brentwood Acad: Transcript on file in district court. [03-5278] [2712672-1] (blh) [03-5278]

* * *

4/25/03 TRANSCRIPT ORDER completed by court reporter Jim Spence for Document [2705524-1] transcript involving, Richard L. Colbert, Jim Spence. Number of pages: 2969 (10 vols) filed in DC on 4/23/03. [03-5245] (blh) [03-5245]

5/12/03 Mediation Office is no longer involved in this appeal at this time. (lmn) [03-5245 03-5278]

5/23/03 BRIEFING LETTER SENT setting cross appeal briefing schedule: first proof brief (TSSAA & Carter) due 7/2/03 ; second proof brief (Brentwood) due 8/1/03 ; ; third proof brief (TSSAA & Carter) due 9/2/03 ; fourth proof brief (Brentwood) due 9/16/03 ; appendix due 9/23/03 ; final briefs due 10/14/03 ; [03-5245, 03-5278] . (mcp) [03-5245 03-5278]

* * *

6/3/03 LETTER SENT by mcp granting motion to extend briefing [2755793-1] filed by Richard L. Colbert. Resetting cross appeal briefing schedule: first proof brief (TSSAA & Carter) due 8/1/03 ;

second proof brief (Brentwood) due 9/2/03 ; ; third proof brief due 10/2/03 ; fourth proof brief due 10/16/03 ; appendix due 10/23/03 ; [03-5245, 03-5278] first final briefs now due 11/13/03 ; (mcp) [03-5245 03-5278]

* * *

6/20/03 LETTER SENT by mcp granting motion to extend briefing [2766265-1] filed by W. Brantley Phillips Jr. Resetting cross appeal briefing schedule: first proof brief still due 8/1/03 ; second proof brief due 11/3/03 ; third proof brief due 12/3/03 ; fourth proof brief due 12/17/03 ; appendix due 12/24/03 ; [03-5245, 03-5278] final briefs now due 1/14/04 (mcp) [03-5245 03-5278]

* * *

8/13/03 LETTER SENT by mcp resetting cross appeal briefing schedule: first proof brief now due 8/27/03 ; second proof brief due 11/3/03 ; third proof brief due 12/3/03 ; fourth proof brief due 12/17/03 ; appendix due 12/24/03 ; [03-5245, 03-5278] final briefs now due 1/14/04 ; (mcp) [03-5245 03-5278]

9/2/03 FIRST PROOF BRIEF filed by W. Gregory Miller, John Christopher Anderson and Richard L. Colbert for Appellants Cross-Appellees Ronnie Carter & TSSAA. Certificate of Service date 8/27/03. Number of Pages: 84. [03-5245, 03-5278] (lak) [03-5245 03-5278]

9/2/03 Request to require oral argument filed by Richard L. Colbert for Appellant Cross-Appellee Ronnie

Carter, [03-5245, 03-5278] (lak) [03-5245 03-5278]

11/7/03 PROOF BRIEF filed by H. Lee Barfield , W. Brantley Phillips , James F. Blumstein for Appellee Cross-Appellant Brentwood Acad Copies: 1. Certificate of Service date 11/3/03 . Number of Pages: 78. [03-5245, 03-5278] _ (lak) [03-5245 03-5278]

11/7/03 Request to require oral argument filed by W. Brantley Phillips for Appellee Cross-Appellant Brentwood Acad [03-5245, 03-5278] (lak) [03-5245 03-5278]

11/12/03 BRIEFING LETTER SENT requesting proof brief corrections from W. Brantley Phillips , James F. Blumstein , H. Lee Barfield in 03-5245, because references to the record, remove tabs. Corrections due: 11/26/03 in 03-5245, in 03-5278 . (lak) [03-5245 03-5278]

11/12/03 Amicus MOTION filed to allow Chester E. Finn, Jr., and Daniel Casse to file an amicus brief in support of Brentwood Academy. Motion filed by pro se Amicus Curiae Chester E. Finn and pro se Amicus Curiae Daniel Casse. Certificate of service date 11/10/03 . [03-5245, 03-5278] (mcp) [03-5245 03-5278]

11/12/03 BRIEF TENDERED. Received from pro se Amicus Curiae Chester E. Finn and pro se Amicus Curiae Daniel Casse, in support of Brentwood Academy. [03-5245, 03-5278] . Certificate of service date 11/10/03. Copies: 7, Pages: 13. (mcp) [03-5245 03-5278]

11/14/03 BRIEF filed by John F. Daly for Amicus Curiae FTC. Copies 7. Certificate of service date 11/13/03. Number of Pages: 37. [03-5245, 03-5278] (mcp) [03-5245 03-5278]

11/19/03 Appellant RESPONSE in opposition filed regarding a motion for leave to file w amicus curiae [2852738-1] motion previously filed by Chester E. Finn Jr., Daniel Casse. Response from Richard L. Colbert for Appellants Cross-Appellees Ronnie Carter, TSSAA. Certificate of service date 11/17/03 . [03-5245, 03-5278] (mcp) [03-5245 03-5278]

11/24/03 Corrected second proof brief filed by W. Brantley Phillips . Copies: 1. Certificate of Service date 11/21/03 [03-5245, 03-5278] (lak) [03-5245 03-5278]

11/24/03 Appellee RESPONSE in support filed regarding a motion for leave to file amicus curiae brief [2852738-1] motion previously filed by Chester E. Finn Jr., Daniel Casse. Response from W. Brantley Phillips for Appellee Cross-Appellant Brentwood Acad. Certificate of service date 11/21/03 [03-5245, 03-5278] (mcp) [03-5245 03-5278]

* * *

11/25/03 LETTER SENT by mcp granting joint motion to amend remaining appellate briefing deadlines [2857905-1] filed by W. Brantley Phillips Jr., Richard L. Colbert. Resetting cross appeal briefing schedule: third proof brief due 12/17/03 ; fourth proof brief due 12/31/03 ; appendix due

1/14/04 ; [03-5245, 03-5278] all final briefs now due 2/4/04 ; (mcp) [03-5245 03-5278]

* * *

12/1/03 Appellant MOTION filed to strike Attachment B from Brentwood Academy's proof brief. Motion filed by Richard L. Colbert for Appellants Cross-Appellees Ronnie Carter, TSSAA. Certificate of service date 11/26/03 [03-5245, 03-5278] (mcp) [03-5245 03-5278]

12/3/03 LETTER SENT by mcp to all parties. The briefing schedule of 11/25/03 has been cancelled and briefing will be held in abeyance pending a ruling on axe's motion to strike. [03-5245, 03-5278] (mcp) [03-5245 03-5278]

12/12/03 Appellee RESPONSE in opposition filed regarding a motion to strike [2861341-1] previously filed by Richard L. Colbert. Response from W. Brantley Phillips for Appellee Cross-Appellant Brentwood Acad. Certificate of service date 12/11/03 [03-5245, 03-5278] (mcp) [03-5245 03-5278]

12/17/03 REPLY in support of motion to strike filed by Richard L. Colbert for Appellants Cross-Appellee Ronnie Carter, TSSAA. Certificate of service date 12/15/03. [03-5245, 03-5278] (mcp) [03-5245 03-5278]

2/24/04 ORDER filed granting motion to strike [2861341-1] filed by Richard L. Colbert. The plaintiff is directed to strike Exhibit B and the reference to that ad within the text of its brief when it submits

the final brief. [03-5245, 03-5278] Boyce F. Martin, Circuit Judge. (mcp) [03-5245 03-5278]

2/25/04 BRIEFING LETTER SENT resetting cross appeal briefing schedule: third proof brief due 3/25/04 ; fourth proof brief due 4/19/04 ; appendix due 5/3/04 ; all final briefs due 5/24/04 ; [03-5245, 03-5278] . (mcp) [03-5245 03-5278]

3/26/04 PROOF BRIEF filed by Richard L. Colbert , W. Gregory Miller ,John Christopher Anderson for Appellant Cross-Appellee Ronnie Carter, Appellant Cross-Appellee TSSAA . Certificate of service date 3/25/04 . Number of Pages: 67. [03-5245, 03-5278] _ (lak) [03-5245 03-5278]

* * *

4/1/04 Amicus MOTION filed for leave of National Federation of State High School Association to file amicus curiae brief in support of reversal on Brentwood Academy, motion filed by William E. Quirk & James M. Humphrey for Amicus Curiae Natl Fed St High. Certificate of service date 3/31/04 . [03-5245, 03-5278] (mcp) [03-5245 03-5278]

4/1/04 BRIEF TENDERED. Received from William E. Quirk and James M. Humphrey for Amicus Curiae Natl Fed St High. Pages: 20. [03-5245, 03-5278] . Certificate of service date 3/31/04. (mcp) [03-5245 03-5278]

4/9/04 Amicus MOTION filed for leave to file amicus brief out-of-time [2938012-1] . Motion filed by James M. Humphrey for Amicus Curiae Natl Fed St High.

Certificate of service date 4/8/04 . [03-5245, 03-5278] (mcp) [03-5245 03-5278]

* * *

4/15/04 LETTER SENT by mcp granting motion to extend briefing [2938052-1] filed by W. Brantley Phillips Jr. [03-5245, 03-5278] Resetting cross appeal briefing schedule: fourth proof brief due 5/10/04 ; appendix due 5/17/04 ; all final briefs now due 6/7/04 ; (mcp) [03-5245 03-5278]

4/26/04 Appellee RESPONSE in opposition filed to National Federal of State High School Associations' motion for leave to file amicus curiae brief out-of-time [2938012-1] previously filed by James M. Humphrey. Response from W. Brantley Phillips for Appellee Cross-Appellant Brentwood Acad. Certificate of service date 4/23/04 [03-5245, 03-5278] (mcp) [03-5245 03-5278]

5/5/04 REPLY filed by James M. Humphrey for Amicus Curiae Natl Fed St High in support of motion for leave to file amicus curiae brief out-of-time. [03-5245, 03-5278] (mcp) [03-5245 03-5278]

5/5/04 REPLY filed by Richard L. Colbert for Appellants Cross-Appellees Ronnie Carter, and TSSAA in support of motion for leave to file amicus curiae brief [03-5245, 03-5278] (mcp) [03-5245 03-5278]

5/11/04 PROOF (Fourth) BRIEF filed by W. Brantley Phillips, James F. Blumstein and H. Lee Barfield for Appellee, Cross-Appellant Brentwood Acad. Certificate of service date 5/10/04 . Number of

Pages: 38. [03-5245, 03-5278] (lmn) [03-5245 03-5278]

5/17/04 BRIEFING LETTER SENT requesting fourth proof reply brief corrections from W. Brantley Phillips, H. Lee Barfield and James F. Blumstein because the Table of Authorities is not in alphabetical order, footnotes must be same sized text as used in the body of the brief and the cover should state Plaintiff/Appellee, Cross-Appellant. Corrections due: 5/31/04 in 03-5245, in 03-5278 . (lmn) [03-5245 03-5278]

5/18/04 APPENDIX filed by Richard L. Colbert for Appellants Cross-Appellees Ronnie Carter and TSSAA. Copies: 5. (Vol I thru XV) Certificate of service date 5/17/04 [03-5245, 03-5278] (lmn) [03-5245 03-5278]

5/27/04 Corrected Fourth Proof Reply brief filed by W. Brantley Phillips, H. Lee Barfield and James F. Blumstein. Copies: 1. Certificate of Service date 5/26/04 [03-5245, 03-5278] (lmn) [03-5245 03-5278]

5/27/04 Appellant MOTION filed to strike arguments appearing in Section I(B), Section II, and Section III from the proof reply brief of appelee Brentwood Academy. Motion filed by Richard L. Colbert for Appellants Cross-Appellees Ronnie Carter, TSSAA. Certificate of service date 5/26/04 [03-5245, 03-5278] (mcp) [03-5245 03-5278]

6/2/04 Appellee MOTION filed for extension of time of 2 weeks, until 6/25/04, to respond to motion to strike [2966777-1] previously filed by Richard L. Colbert.

Motion filed by W. Brantley Phillips for Appellee Cross-Appellant Brentwood Acad. Certificate of service date 6/1/04 . [03-5245, 03-5278] (mcp) [03-5245 03-5278]

6/4/04 LETTER SENT by mcp granting motion to extend time to respond to a previously filed motion [2966784-1] filed by W. Brantley Phillips Jr. Appellee Cross-Appellant's response is due by 6/25/2004. [03-5245, 03-5278] (mcp) [03-5245 03-5278]

6/8/04 SECOND FINAL BRIEF filed by W. Brantley Phillips, H. Lee Barfield and James F. Blumstein for Appellee Cross-Appellant Brentwood Acad. Copies: 7 Certificate of service date 6/7/04 . Number of Pages: 75. [03-5245, 03-5278] (lmn) [03-5245 03-5278]

6/8/04 Request to require oral argument filed by W. Brantley Phillips, H. Lee Barfield and James F. Blumstein for Appellee Cross-Appellant Brentwood Acad. [03-5245, 03-5278] (lmn) [03-5245 03-5278]

6/8/04 FOURTH FINAL BRIEF filed by W. Brantley Phillips, James F. Blumstein and H. Lee Barfield for Appellee Cross-Appellant Brentwood Acad. Copies: 7. Certificate of service date 6/7/04 . Number of Pages: 39. [03-5245, 03-5278] (lmn) [03-5245 03-5278]

6/9/04 FINAL BRIEF filed by Richard L. Colbert, W. Gregory Miller and John Christopher Anderson for Appellants Cross-Appellees Ronnie Carter and

TSSAA. Copies: 7. Certificate of service date 6/3/04 . Number of Pages: 66. [03-5245, 03-5278] (lmn) [03-5245 03-5278]

6/28/04 Appellee RESPONSE in oppositon filed regarding a motion to strike [2966777-1] ; previously filed by Richard L. Colbert. Response from W. Brantley Phillips for Appellee Cross-Appellant Brentwood Acad. Certificate of service date 6/25/04 [03-5245, 03-5278] (mcp) [03-5245 03-5278]

6/29/04 ORDER filed referring to hearing panel motion to strike [2966777-1] filed by Richard L. Colbert and the response in opposition [2981009-1] filed by W. Brantley Philips [03-5245, 03-5278] (mcp) [03-5245 03-5278]

* * *

7/1/04 RULING granting motion to extend briefing [2982997-1] filed by Richard L. Colbert [03-5245, 03-5278] (lmn) [03-5245 03-5278]

7/1/04 FIRST FINAL BRIEF filed by Richard L. Colbert, W. Gregory Miller and John Christopher Anderson for Appellants Cross-Appellees Ronnie Carter and TSSAA. Copies: 7. Certificate of Service date 6/30/04 . Number of Pages: 71. [03-5245, 03-5278] (lmn) [03-5245 03-5278]

7/1/04 Request to require oral argument filed by Richard L. Colbert , W. Gregory Miller and John Christopher Anderson for Appellants Cross-Appellees Ronnie Carter and TSSAA. [03-5245, 03-5278] (lmn) [03-5245 03-5278]

7/6/04 REPLY filed by Richard L. Colbert for Appellants Cross-Appellees Ronnie Carter, TSSAA in support to strike. Certificate of service date 7/2/04. [03-5245, 03-5278] (mcp) [03-5245 03-5278]

8/11/04 ADDITIONAL CITATION filed by Richard L. Colbert for Appellants Cross-Appellees Ronnie Carter, TSSAA. Certificate of service date 8/9/04 [03-5245, 03-5278] (mcp) [03-5245 03-5278]

8/30/04 ADDITIONAL CITATION filed by H. Lee Barfield for Appellee Cross-Appellant Brentwood Acad. Certificate of service date 8/26/04 [03-5245, 03-5278] (mcp) [03-5245 03-5278]

10/15/04 Oral argument date set for December 7, 2004 in court room 607. Notice of argument sent to counsel. [03-5245, 03-5278] (pjm) [03-5245 03-5278]

11/10/04 ORDER filed granting motion to allow amicus to file a brief [2852738-1] filed by Chester E. Finn Jr., Daniel Casse, granting motion to allow amicus to file a brief [2931794-1] filed by William E. Quirk, James M. Humphrey, granting motion to file amicus brief out-of-time [2938012-1] filed by James M. Humphrey. [03-5245, 03-5278] Entered by order of the court. (mcp) [03-5245 03-5278]

11/10/04 BRIEF filed by William E. Quirk and James M. Humphrey for Amicus Curiae Natl Fed St High. Copies 26. Certificate of service date 3/31/04 . Number of Pages: 20. [03-5245, 03-5278] (mcp) [03-5245 03-5278]

11/10/04 BRIEF filed by pro se Amicus Curiae Chester E. Finn and pro se Amicus Curiae Daniel Casse. Copies 7. Certificate of service date 11/10/03. Number of Pages: 13. [03-5245, 03-5278] (mcp) [03-5245 03-5278]

11/10/04 ORDER filed denying motion to strike a portion of the argument in Brentwood Academ's reply brief, motion [2966777-1] filed by Richard L. Colbert [03-5245, 03-5278] Entered by order of the court. (mcp) [03-5245 03-5278]

11/23/04 ADDITIONAL CITATION filed by H. Lee Barfield for Appellee Cross-Appellant Brentwood Acad. Certificate of service date 1/22/04 [03-5245, 03-5278] (mcp) [03-5245 03-5278]

12/3/04 Appellant RESPONSE filed to exa's additional citations. Response from Richard L. Colbert for Appellants Cross-Appellees Ronnie Carter, TSSAA. Certificate of service date 12/2/04 . [03-5245, 03-5278] (mcp) [03-5245 03-5278]

12/7/04 CAUSE ARGUED on 12/7/04 by Richard L. Colbert for Appellant Cross-Appellee Ronnie Carter, Appellant Cross-Appellee TSSAA in 03-5245, James F. Blumstein for Appellee Cross-Appellant Brentwood Acad in 03-5245, Richard L. Colbert for Appellant Cross-Appellee Ronnie Carter, Appellant Cross-Appellee TSSAA in 03-5278, James F. Blumstein for Appellee Cross-Appellant Brentwood Acad in 03-5278 before Judges Gibbons, Rogers, Bell. [03-5245, 03-5278] (kal) [03-5245 03-5278]

12/17/04 ADDITIONAL CITATION filed by Richard L. Colbert for Appellants Cross-Appellees Ronnie Carter, TSSAA. Certificate of service date 12/15/04 [03-5245, 03-5278] (mcp) [03-5245 03-5278]

12/20/04 Appellee RESPONSE filed to axe's additional citations. Response from James F. Blumstein for Appellee Cross-Appellant Brentwood Acad. Certificate of service date 12/17/04 [03-5245, 03-5278] (mcp) [03-5245 03-5278]

12/29/04 Errata to Appellant's final brief and final reply brief James F. Blumstein for Appellee Cross-Appellant Brentwood Acad. [03-5245, 03-5278] (mcp) [03-5245 03-5278]

1/4/05 ADDITIONAL CITATION filed by Richard L. Colbert for Appellants Cross-Appellees Ronnie Carter, TSSAA. Certificate of service date 1/3/05 [03-5245, 03-5278] (mcp) [03-5245 03-5278]

1/18/05 Appellee RESPONSE filed to Carter & TSSAA's addititional citations. Response from James F. Blumstein for Appellee Cross-Appellant Brentwood Acad. Certificate of service date 1/12/05 [03-5245, 03-5278] (mcp) [03-5245 03-5278]

8/26/05 ADDITIONAL CITATION filed by James F. Blumstein for Appellee Cross-Appellant Brentwood Acad. Certificate of service date 8/25/05 [03-5245, 03-5278] (mcp) [03-5245 03-5278]

9/2/05 Appellant RESPONSE filed to exa's additional citations. Response from Richard L. Colbert for Appellants Cross-Appellees Ronnie Carter,

TSSAA. Certificate of service date 8/31/05 . [03-5245, 03-5278] (mcp) [03-5245 03-5278]

9/19/05 ADDITIONAL CITATION filed by Richard L. Colbert for Appellants Cross-Appellees Ronnie Carter, TSSAA . Certificate of service date 9/15/05 [03-5245, 03-5278] (mcp) [03-5245 03-5278]

9/21/05 Appellee RESPONSE filed to additional citations filed 9/19/05. Response from James F. Blumstein for Appellee Cross-Appellant Brentwood Acad. Certificate of service date 9/20/05 [03-5245, 03-5278] (mcp) [03-5245 03-5278]

3/17/06 OPINION filed: The judgment of the district court is AFFIRMED in part, REVERSED in part and REMANDED for further proceedings, decision for publication pursuant to local rule 206 [03-5245, 03-5278] Julia S. Gibbons, Authoring Judge, John M. Rogers, Circuit Judge, delivered a separate dissenting opinion, Robert H. Bell, Chief U.S. District Judge for the W.D. of MI. (ac) [03-5245 03-5278]

3/17/06 JUDGMENT: AFFIRMED in part, REVERSED in part and REMANDED . (ac) [03-5245 03-5278]

3/31/06 PETITION for en banc rehearing filed by Richard L. Colbert for Appellants Cross-Appellees Ronnie Carter, Cross-Appellee TSSAA. Certificate of service date 3/30/06. [03-5245, 03-5278] (blh) [03-5245 03-5278]

6/27/06 ORDER filed denying petition for en banc rehearing [3349910-1] filed by Richard L. Colbert

[03-5245, 03-5278]. Julia S. Gibbons, John M. Rogers, Circuit Judges; Robert H. Bell, District Judge. (blh) [03-5245 03-5278]

7/11/06 MANDATE ISSUED with no cost taxed [03-5245, 03-5278] (mcp) [03-5245 03-5278]

9/29/06 U.S. Supreme Court notice filed regarding petition for writ of certiorari filed by Appellant Cross-Appellee TSSAA in 03-5245, Appellant Cross-Appellee TSSAA in 03-5278 . Filed in the Supreme Court on 09-25-06 , Supreme Ct. case number: 06-427 . [03-5245, 03-5278] (swh) [03-5245 03-5278]

1/10/07 U.S. Supreme Court letter filed granting petition for writ of certiorari [3454596-1] filed by TSSAA, TSSAA Supreme Court No. 06-427 [03-5245, 03-5278] in 03-5245, 03-5278 . Filed in the Supreme Court on 01-05-07 . (swh) [03-5245 03-5278]

U.S. DISTRICT COURT FOR THE
MIDDLE DISTRICT OF TENNESSEE (NASHVILLE)

No. 3:97-CV-01249

Date Filed	#	Docket Text
12/12/1997	1	COMPLAINT w/ att'd exhibits A-G (Summons(es) issued) Filing fee paid in the amount of : $150 Receipt # 61078 (af) (Entered: 12/15/1997)
12/12/1997	2	NOTICE of Initial Case Management Conference Case referred to Magistrate Judge William J. Haynes Jr. , ; Case Management Conference set for 2:00 1/28/98 (af) (Entered: 12/15/1997)
		* * *
01/07/1998	6	MOTION by defts to strike various portions of the cmp (dm) (Entered: 01/08/1998)
01/07/1998	7	MEMORANDUM by defts in support of motion to strike various portions of the cmp [6-1] (dm) (Entered: 01/08/1998)
01/07/1998	8	ANSWER by defts to [1-1] (dm) (Entered: 01/08/1998)
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02/04/1998	12	RESPONSE in OPPOSITION by pltf Brentwood Academy to motion to strike various portions of the cmp [6-1] (dm) (Entered: 02/05/1998)

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02/23/1998	14	AGREED CASE MANAGEMENT ORDER NO. 1 approved by Magistrate Judge William J. Haynes Jr.: Counsel for parties shall confer about an agreement on a set of joint factual stipulations prior to 3/6/98. Case Management Conference held 2/17/98. Case Management Telephone Conference set for 3:30 on 3/6/98 . The Court plans to rule upon the defts' motion to strike w/o oral argument (cc: all counsel) EOD 2/23/98 (dm) (Entered: 02/23/1998)

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03/16/1998	15	ORDER by Magistrate Judge William J. Haynes Jr.: Discovery ddl: 5/15/98. Motion filing ddl: 6/1/98. Case Management Conference held 3/11/98. In court hearing set for 9:00 on 7/13/98 before Judge Campbell (cc: all counsel) (dm) (Entered: 03/17/1998)
03/17/1998	16	ORDER by Judge Todd J. Campbell: Preliminary Injunction hearing set for 9:00 on 7/13/98. The parties shall file witness lists, exhibit lists, motions in limine, and stipulations by 7/6/98. The

parties are ordered to file by 4/1/98, briefs on the issue of whether the trial of the action on the merits should be advanced and consolidated with the hearing on the application for a preliminary injunction (cc: all counsel) EOD 3/17/98 (dm) (Entered: 03/17/1998)

04/01/1998 17 BRIEF FILED by pltf pursuant to Order [39] on consolidation of trial on merits with preliminary injunction hearing (dm) (Entered: 04/01/1998)

04/01/1998 18 BRIEF FILED by defts on trial on the Merits pursuant to Order [16] (dm) (Entered: 04/01/1998)

04/16/1998 19 ORDER by Judge Todd J. Campbell: Because the application for preliminary injunction has not yet been filed, the Court takes under advisement this issue of consolidating the hearing on the preliminary injunction with the trial on the merits until such time as the application and a response thereto have been filed with the Court. The parties are ordered to address, in the application for preliminary injunction and response thereto, the issue of whether the hearings should be so consolidated (cc: all counsel) EOD 4/16/98 (dm) (Entered: 04/16/1998)

04/22/1998	20	MOTION by pltf Brentwood Academy for protective order (dm) (Entered: 04/23/1998)
04/22/1998	21	MEMORANDUM by pltf Brentwood Academy in support of motion for protective order [20-1] (w/attachments A,B,C) (dm) (Entered: 04/23/1998)
04/27/1998	22	RESPONSE by deft to motion for protective order [20-1] (tlc) (Entered: 04/28/1998)
04/29/1998		PROPOSED Protective Order No. 1 (dm) (Entered: 04/29/1998)
04/30/1998	23	ORDER by Magistrate Judge William J. Haynes Jr. granting motion for protective order [20-1]. The subpoenas duces tecum issued on 3/24/98 to Bill Brown and Nancy Brasher are quashed to the extent that they require the production of financial aid documents and other financial information related to any students other than the four students the TSSAA has charged were recruited improperly. The subpoenas are also quashed to the extent that they are construed to request educational records of any students at Brentwood Academy other than the four students that the TSSAA has charged were recruited improperly. The Order is entered w/o prej to the right of the defts to seek production of financial information on

other students and their families at a later date after pltf has filed its papers on 6/1/98 (cc: all counsel) EOD 4/30/98 (dm) (Entered: 04/30/1998)

06/01/1998 24 COMBINED STIPULATIONS, submitted by the parties w/attached exhibits A - E (tlc) (Entered: 06/01/1998)

06/01/1998 25 MOTION by pltf Brentwood Academy for leave to file an Amended Cmp (w/exhibit) (dm) (Entered: 06/02/1998)

06/01/1998 PROPOSED Order gr mtn [25] (dm) (Entered: 06/02/1998)

06/01/1998 26 MEMORANDUM of LAW by pltf Brentwood Academy in support of motion for leave to file an Amended Cmp [25-1] (dm) (Entered: 06/02/1998)

06/01/1998 27 MOTION by pltf Brentwood Academy for partial summary judgment , for permanent injunction (dm) (Entered: 06/02/1998)

06/01/1998 28 MEMORANDUM of LAW by pltf in support of motion for partial summary judgment [27-1], of motion for permanent injunction [27-2] (dm) (Entered: 06/02/1998)

06/01/1998 29 APPENDIX (1 thru 15) filed by pltf re [28-1] (dm) (Entered: 06/02/1998)

06/01/1998	30	AFFIDAVIT of Carlton Flatt re [27-1], re [27-2] (dm) (Entered: 06/02/1998)
06/01/1998	31	STATEMENT of facts by pltf Brentwood Academy in support of [27-1], in support of [27-2] (w/attachments A thru Q) (dm) (Entered: 06/02/1998)
06/10/1998	32	NOTICE by pltf of filing amended memo of law in support of mtn for partial summary jgm (ts) (Entered: 06/11/1998)
06/10/1998	33	AMENDED MEMORANDUM OF LAW by pltf in support of motion for partial summary judgment [27-1] (ts) (Entered: 06/11/1998)

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06/17/1998	35	RESPONSE by defts to mtn for leave to file an Amended Cmp [25-1] (ts) (Entered: 06/18/1998)

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06/26/1998	39	ORDER by Judge Todd J. Campbell denying motion to strike [6-1]; denying mtn for leave to file an Amended Cmp [25-1] (EOD 6/26/98) (cc: all counsel) (ts) (Entered: 06/26/1998)

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06/30/1998	42	NOTICE by defts of filing copies of depositions of: William Bailey Brown, Jr.

taken 4/30/98, Ronnie Carter Vol 1 - 2 taken 5/5/98 & Kevin D. Armstrong taken 4/23/98; w/attached copies of depositions and their respective exhibits (tlc) (Entered: 06/30/1998)

06/30/1998 43 STATEMENT of issues to be discussed at status conference; submitted by pltf (tlc) (Entered: 06/30/1998)

06/30/1998 44 STATEMENT of issues by defts' TN Secondary School, & Ronnie Carter pursuant to Court's order [41-2] (jb) (Entered: 07/01/1998)

06/30/1998 45 RESPONSE by defts' TN Secondary School, & Ronnie Carter to motion for partial summary judgment [27-1] (jb) (Entered: 07/01/1998)

06/30/1998 46 RESPONSE by defts' TN Secondary School, & Ronnie Carter to Statment of Undisputed Material Facts [31-1] (jb) (Entered: 07/01/1998)

06/30/1998 47 MOTION by defts' TN Secondary School, & Ronnie Carter for summary judgment (jb) (Entered: 07/01/1998)

06/30/1998 48 MEMORANDUM by defts' TN Secondary School, & Ronnie Carter in support of motion for summary judgment [47-1] (w/attachment) (jb) (Entered: 07/01/1998)

06/30/1998	49	STATEMENT of undisputed facts by defts' TN Secondary School, & Ronnie Carter in support of [47-1] (jb) (Entered: 07/01/1998)
06/30/1998	50	NOTICE of filing by defts' TN Secondary School, & Ronnie Carter of the following affidavits: Ronnie Carter, Jerome V. Sailors, Dr. Maurice M. McDonald, Jr., Marshall Eugene Foster, III, Charles Thomas Colvin, John L. Mantooth, Clay Wesley Moricle, Joel Hargis, Steven L. Maloan, & James D. Towater (w/attached affidavits) (jb) (Entered: 07/01/1998)
06/30/1998	51	AFFIDAVIT of Ronnie Carter re motion for summary judgment [47-1] (w/attachment) (jb) Modified on 07/01/1998 (Entered: 07/01/1998)
06/30/1998	52	AFFIDAVIT of Jerome V. Sailors re motion for summary judgment [47-1] (w/attachment) (jb) (Entered: 07/01/1998)
06/30/1998	53	AFFIDAVIT of Dr. Maurice M. McDonald Jr. re motion for summary judgment [47-1] (jb) (Entered: 07/01/1998)
06/30/1998	54	AFFIDAVIT of Marshall Eugene Foster III re motion for summary judgment [47-1] (jb) (Entered: 07/01/1998)

06/30/1998	55	AFFIDAVIT of Charles Thomas Colvin re motion for summary judgment [47-1] (jb) (Entered: 07/01/1998)
06/30/1998	56	AFFIDAVIT of John L. Mantooth re motion for summary judgment [47-1] (jb) (Entered: 07/01/1998)
06/30/1998	57	AFFIDAVIT of Clay Wesley Moricle re motion for summary judgment [47-1] (jb) (Entered: 07/01/1998)
06/30/1998	58	AFFIDAVIT of Joel Hargis re motion for summary judgment [47-1] (jb) (Entered: 07/01/1998)
06/30/1998	59	AFFIDAVIT of Steven L. Maloan re motion for summary judgment [47-1] (jb) (Entered: 07/01/1998)
06/30/1998	60	AFFIDAVIT of James D. Towater re motion for summary judgment [47-1] (jb) (Entered: 07/01/1998)

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07/02/1998	62	ORDER by Judge Todd J. Campbell setting hearing for 7/16/98 at 1:00pm on mtn for summary jgm [47-1], mtn for partial summary jgm [27-1], and mtn for permanent inj [27-2]. The pltf shall file its response to the defts' mtn for summary jgm by 7/15/98 [47-1] (EOD 7/2/98) (cc: all counsel) (ts) (Entered: 07/02/1998)

07/14/1998	63	ORDER by Judge Todd J. Campbell directing parties to file certified copies of the minutes of the State Board of Education from 1972-1997. (EOD 7/15/98) (cc: all counsel) (ts) (Entered: 07/15/1998)
07/14/1998	64	ORDER by Judge Todd J. Campbell notifying parties that it is not necessary to file the minutes of the State Board of Education before the hearing on 7/16/98. Counsel shall be prepared to discuss their respective positions on the minutes & the support for those positions. (EOD 7/15/98) (cc: all counsel) (ts) (Entered: 07/15/1998)
07/14/1998	65	RESPONSE by pltf Brentwood Academy to Order of 7/14/98 [63-1] regarding SBOE minutes (attachments) (ts) (Entered: 07/15/1998)
07/14/1998	66	AFFIDAVIT of Gary Nixon re [65-1] (ts) (Entered: 07/15/1998)
07/14/1998	67	AFFIDAVIT of Melna R. Van Beber re [65-1] (ts) (Entered: 07/15/1998)
07/15/1998	68	REPLY by pltf in support of partial summary judgment [27-1] w/reponse to deft's mtn for summary jgm (attachments A-C) (ts) (Entered: 07/15/1998)

07/15/1998	68	RESPONSE by pltf to deft's mtn for summary jgm [47-1] (ts) (Entered: 07/15/1998)
07/15/1998	69	APPENDIX (1-16) filed by pltf to reply in support of partial summary jgm [68-1] (ts) (Entered: 07/15/1998)
07/15/1998	70	RESPONSE by pltf to defts' statement of undisputed facts [44-1] [49-1] (attachments A-D) (ts) (Entered: 07/15/1998)
07/15/1998	71	MOTION by pltf to strike affidavits of Dr. Maurice M. McDonald, Jr. and Marsshall Eugene Foster III and supporting memorandum of law (ts) (Entered: 07/15/1998)
07/15/1998	72	NOTICE by pltf of filing afdts of Tate, Haguewood, Inell, Flatt, & Brasher (ts) (Entered: 07/15/1998)
07/15/1998	73	AFFIDAVIT of Liz Tate re [68-1] (ts) (Entered: 07/15/1998)
07/15/1998	74	AFFIDAVIT of Ellis Haguewood re [68-1] (ts) (Entered: 07/15/1998)
07/15/1998	75	AFFIDAVIT of Rick Insell re [68-1] (ts) (Entered: 07/15/1998)
07/15/1998	76	AFFIDAVIT of Carlton Flatt re [68-1] (ts) (Entered: 07/15/1998)

07/15/1998	77	AFFIDAVIT of Nancy Brasher re [68-1] (ts) (Entered: 07/15/1998)
07/15/1998	78	NOTICE by pltf of fiing deposition transcripts of Flatt, Watson, Peek, & Armstrong (ts) (Entered: 07/15/1998)
07/15/1998	79	MEMORANDUM by pltf Brentwood Academy in opposition to motion for summary judgment [47-1] (tlc) (Entered: 07/15/1998)
07/15/1998	80	NOTICE of filing deposition transcripts in support of memorandum in opposition to motion for summary judgment; submitted by pltfs; w/attachments (tlc) (Entered: 07/15/1998)
07/15/1998	81	APPENDIX filed by pltf Brentwood Academy re memorandum in opposition to defts' TSSAA & Carter's motion for summary judgment on the state claims [79-1] (w/attached exhs. 1-12) (jb) (Entered: 07/16/1998)
07/16/1998	82	NOTICE by pltf Brentwood Academy of filing copy of affidavit of Liz Tate (w/attached exh. A) (jb) Modified on 07/16/1998 (Entered: 07/16/1998)
07/16/1998	83	NOTICE by defts of filing of minutes of State Board of Education for meetings between 4/19/95 and 5/27/98, pertinent memoranda of C. Brent Polton and afdts

		of Cynthia Hunter Spivey and Dr. Gary Nixon (gi) (Entered: 07/16/1998)
07/16/1998	84	AFFIDAVIT of Cynthia Hunter Spivey (gi) (Entered: 07/16/1998)
07/16/1998	85	AFFIDAVIT of Dr. Gary Nixon (gi) (Entered: 07/16/1998)
07/16/1998	86	CLERK'S RESUME Motion hearing held 7/16/98 ; Oral argument held on all pending motions. Order to enter C/R : Sherry Storey (jb) (Entered: 07/17/1998)
07/20/1998	87	NOTICE by pltf Brentwood Academy of filing of the affidavit of Ellis Haguewood with annexed exh. A; Exh. A was omitted from previous filing of original affidavit of Ellis Haguewood [74-1] (w/attached copy of affidavit & exh. A) (jb) Modified on 07/21/1998 (Entered: 07/21/1998)
07/20/1998	88	THIRD AFFIDAVIT of Carlton Flatt (w/attached exhs. A & B) (jb) (Entered: 07/21/1998)
07/22/1998	89	MEMORANDUM by pltf Brentwood Academy regarding deft Carter's participation in TSSAA Board of Control Hearing of 8/23/97 (jb) (Entered: 07/22/1998)
07/22/1998	90	MOTION by pltf Brentwood Academy for leave to file amended complaint and

		memorandum in support thereof (w/attached proposed order) (jb) (Entered: 07/22/1998)
07/22/1998	91	NOTICE by pltf Brentwood Academy of filing the following deposition transcripts: Wanda Belt, Lynn Brown, Morris Rogers (w/attached copies of depos) (cy of deposition of John Dixon also attached but not listed in ntc of filing) (jb) Modified on 07/23/1998 (Entered: 07/23/1998)
07/22/1998	92	NOTICE by defts' TN Secondary School & Ronnie Carter of filing of the following: Second Affidavit of Ronnie L. Carter; Affidavit of Charles Walker; Defts' Motion to Strike the Second Affidavit of Carlton Flatt & Affidavit of Liz Tate; Defts' Motion to Strike the Affidavit of Ellis Haguewood; Defts' Response to the Pltf's Motion to Strike the Affidavits of Dr. Maury McDonald & Marshall Eugene Foster (w/attached afdts. of Ronnie L. Carter, Charles Walker, Deft's Motion to Strike Second afdt..., Defts' Motion to Strike aftd of Ellis Haguewood, Resp. to Pltf's...) (jb) (Entered: 07/23/1998)
07/22/1998	93	SECOND AFFIDAVIT of Ronnie L. Carter re Notice of Filing [92-1] (w/attachment) (jb) Modified on 07/23/1998 (Entered: 07/23/1998)

07/22/1998	94	MOTION by defts' TN Secondary School & Ronnie Carter to strike Second Affidavit of Carlton Flatt & Affidavit of Liz Tate (jb) (Entered: 07/23/1998)
07/22/1998	95	MOTION by defts' TN Secondary School & Ronnie Carter to strike Affidavit of Ellis Haguewood (jb) (Entered: 07/23/1998)
07/22/1998	96	RESPONSE by defts' TN Secondary School & Ronnie Carter to motion to strike affidavits of Dr. Maury McDonald, and Marshall Eugene Foster III [71-1] (jb) (Entered: 07/23/1998)
07/24/1998	97	RESPONSE by defts to pltf's motion for leave to file amended complaint and memorandum in support thereof [90-1]; w/attachments (tlc) (Entered: 07/24/1998)
07/24/1998	98	RESPONSE by defts to pltf's memorandum re deft Carter's participation in 8/23/97 TSSAA Board of Control Hearing [89-1] (tlc) (Entered: 07/24/1998)
07/24/1998	99	NOTICE by defts to attys of record of filing responses, DE #'s 97 & 98 (tlc) (Entered: 07/24/1998)
07/24/1998	100	REPLY by pltf to response to motion to strike affidavits of Dr. Maurice M. McDonald, Jr. and Marshall Eugene

Foster III [71-1] (gi) (Entered: 07/27/1998)

07/24/1998 101 RESPONSE by pltf to motion to strike Second Affidavit of Carlton Flatt & Affidavit of Liz Tate [94-1] (gi) (Entered: 07/27/1998)

07/24/1998 102 RESPONSE by pltf to motion to strike Affidavit of Ellis Haguewood [95-1] (gi) (Entered: 07/27/1998)

07/24/1998 103 SECOND AFFIDAVIT of Melna Van Beber by pltf (gi) (Entered: 07/27/1998)

07/29/1998 104 MEMORANDUM OF THE COURT (cc: all counsel) (EOD 7/29/98) (tlc) (Entered: 07/29/1998)

07/29/1998 105 ORDER by Judge Todd J. Campbell; court heard oral argument on the following pending motions on 7/16/98; granting in part and denying in part defts' motion for summary judgment [47-1]; granted as to pltf's equitable estoppel claim and that claim is dismissed; granting in part and denying in part pltf Brentwood Academy's motion for partial summary judgment [27-1] & for permanent injunction [27-2]; granted as to claim that TSSAA's Recruiting Ruel violates the 1st Amendment on its face and as applied to Brentwood Academy; defts are hereby enjoined from any use of the Recruiting Rule; all sanctions

		imposed by the TSSAA to Brentwood Academy, DE #1, Ex G, are void and unenforceable; the disposition of other issues presented by the pending motions is discussed in the memorandum (cc: all counsel) (EOD 7/29/98) (tlc) (Entered: 07/29/1998)
07/30/1998	106	NOTICE OF APPEAL by defts TN Secondary School, Ronnie Carter from Dist. Court decision [105-1] (mg) (Entered: 08/03/1998)
07/30/1998	107	RECEIVED filing fee and forwarded to 6th CCA, rcpt #64418 (mg) (Entered: 08/03/1998)
08/14/1998		Short Record on Appeal sent to 6th CCA re [106-1] (mg) (Entered: 08/14/1998)
08/24/1998	108	NOTIFICATION by 6th CCA of Appellate Docket Number 98-6113 (mg) (Entered: 08/25/1998)
08/26/1998		TRANSCRIPT Order Form re [106-1] Transcript unnecessary (mg) (Entered: 08/26/1998)
08/28/1998	109	MOTION by pltf Brentwood Academy for attorneys' fees and related nontaxable expenses , or for scheduling order (dm) (Entered: 09/01/1998)
08/28/1998	110	MEMORANDUM by pltf Brentwood Academy in support of motion for

attorneys' fees and related nontaxable expenses [109-1], or scheduling order [109-2] (dm) (Entered: 09/01/1998)

08/28/1998 111 AFFIDAVIT of G. Thomas Nebel re [109-1], re [109-2] (w/attachment 1) (dm) (Entered: 09/01/1998)

08/28/1998 112 AFFIDAVIT of James F. Blumstein re [109-1], re [109-2] (dm) (Entered: 09/01/1998)

08/28/1998 113 AFFIDAVIT of Aubrey B. Harwell, Jr. re [109-1], re [109-2] (dm) (Entered: 09/01/1998)

08/28/1998 114 AFFIDAVIT of William R. Willis, Jr. re [109-1], re [109-2] (dm) (Entered: 09/01/1998)

08/28/1998 115 AFFIDAVIT of H. Lee Barfield, II re [109-1], re [109-2] (w/attachments 1 and 2) (dm) (Entered: 09/01/1998)

09/09/1998 116 RESPONSE by defts to motion for attorneys' fees and related nontaxable expenses [109-1] (dm) (Entered: 09/10/1998)

09/11/1998 117 ORDER by Judge Todd J. Campbell denying motion for attorneys' fees and related nontaxable expenses [109] w/o prej (cc: all counsel) EOD 9/14/98 (dm) (Entered: 09/14/1998)

06/23/1999	118	INFORMATION COPY from 6th CCA: We REVERSE the district court's grant of sumjgm in favor of Brentwood, VACATE the injunction, and REMAND the case for futher proceedings consistent with this opinion. (mg) (Entered: 06/24/1999)
06/23/1999	119	JUDGMENT 6CCA: District court jgm is REVERSED, injunction is VACATED, and the case is REMANDED to the district court. (mg) (Entered: 06/24/1999)
07/19/1999	120	ORDER by Judge Todd J. Campbell granting motion for leave to file amended complaint [90-1], finding the motion to strike Affidavit of Ellis Haguewood [95-1] moot., finding the motion to strike Affidavit of Carlton Flatt & Affidavit of Liz Tate [94-1] moot., finding the motion to strike affidavits of Dr. Maurice M. McDonald, Jr. and Marsshall Eugene Foster III [71-1] moot. (cc: all counsel) EOD 7/21/99 (mg) (Entered: 07/21/1999)
09/13/1999	121	ORDER from 6th CCA denying petition for reheaing. (mg) (Entered: 09/14/1999)
09/13/1999	122	MANDATE from 6th CCA vacating, reversing and remanding the matter back to District Court [Appeal [118-1] pursuant to the court's info order filed 6/21/99. (mg) (Entered: 09/14/1999)

12/09/1999	123	ORDER by Judge Robert L. Echols; Case reassigned to Magistrate Judge Juliet E. Griffin per the appointment of the Hon. William J. Haynes, Jr. as a U.S. District Judge. All scheduled ddls will remain in effect. (cc: all counsel) (EOD 12/9/99) (jb) (Entered: 12/09/1999)
12/15/1999	124	NOTICE by U.Supreme Court of filing of petition for writ of cert on 11/29/99. (mg) (Entered: 12/15/1999)
02/28/2000	125	ORDER by U.S. Supreme Court: Mtn of Memphis Univ School, et al for leave to file a brief as amicus curiae is granted; mtn of petitioner for summary reversal is denied. The petition for writ os cert is granted. (mg) (Entered: 03/02/2000)
07/31/2000	126	LETTER from U.S. Supreme Court requesting CR (mg) (Entered: 08/01/2000)
08/02/2000		CR Record on Appeal sent to U.S. Supreme Court re [106-1] (mg) (Entered: 08/02/2000)
08/10/2000		REMARK: Ack of CR filed at the Supreme Court of the U.S. on 8/7/00. (mg) (Entered: 08/11/2000)

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02/26/2001	130	ORDER from Supreme Court of the U.S. reversing the judgment of the 6CCA.

		The case is remanded for further proceedings consistent with this opinion. (jb) (Entered: 02/27/2001)
02/28/2001	131	CLERK'S RESUME; Status Conference held 2/28/01 ; This status conference was held to discuss the remaining issues with this court. The possibility of ADR was also discussed. C/R: Jim Spence (jb) (Entered: 03/01/2001)
03/16/2001	132	ORDER by Judge Todd J. Campbell closing file administratively pending appeal (cc: all counsel) EOD 3//16/01 (mg) (Entered: 03/16/2001)
03/16/2001		REMARK: Copy of 3/16/01 order closing case sent to 6C Attn: Yvonne Henderson (mg) Modified on 03/16/2001 (Entered: 03/16/2001)
03/29/2001	133	SYLLABUS from the Supreme Court of the U.S. REVERSING the judgment of the 6CCA and remanding the case for further proceedings consistent with this opinion. (mg) (Entered: 03/30/2001)
03/29/2001	134	JUDGMENT by the Supreme Court of the U.S. REVERSING and REMANDING the judgment of the 6CCA. Further ORDERED that the petitioner Brentwood Academy recover from the Tennessee Secondary School Athletic Association, et al $1,909.00 for

costs herein expended. (mg) (Entered: 03/30/2001)

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08/27/2001	137	INFORMATION COPY from 6th Circuit: The grant of summary judgment in favor of Brentwood is REVERSED and the case is REMANDED to the district court for further proceedings consistent with this opinion. (mg) (Entered: 08/30/2001)
08/27/2001	138	JUDGMENT by the 6CCA: Upon consideration of the 2/20/01 opinion of the U.S. Supreme Court in this case and oral argument of counsel, it is ORDERD that the judgment of the district court granting sumjgm in favor of pltf Brentwood Academy is REVERSED and the case is REMANDED for further proceedings consistent with the opinion of this court. (mg) (Entered: 08/30/2001)
08/29/2001	136	ORDER by Judge Todd J. Campbell; Jury Trial set for 9:00 7/22/02; Pretrial Conference set for 1:00 7/2/02; Joint Pretrial Order ddl 6/26/02; Discovery is reopened and discovery ddl is set for 5/31/02; by 6/17/02, the ptys shall file any motions in limine and any motions objecting to expert testimony (cc: all counsel) (EOD 8/29/01) (jb) Modified on 09/10/2001 (Entered: 08/29/2001)

09/12/2001	139	LETTER from pltf's atty Barfield reiterating that Brentwood Academy is not demanding a jury in this case. Designation to the contrary on the cover sheet was in error. (mg) (Entered: 09/13/2001)
10/03/2001	140	ORDER by Judge Todd J. Campbell vacating [136-1][136-2] Scheduling order setting this case for Jury Trial 9:00 7/22/02; Pretrial Conference set for 1:00 7/2/02; Joint Pretrial Order ddl 6/26/02; Bench Trial set for 9:00 7/22/02 Wit and Exh list due by 6/26/02. (cc: all counsel) EOD 10/3/01 (mg) Modified on 10/11/2001 (Entered: 10/03/2001)
		* * *
12/05/2001	142	MANDATE issued 12/3/01 from 6th CCA reversing and remanding the Decision of the District Court [Appeal [137-1] filed 8/23/01 (mg) (Entered: 12/06/2001)
12/07/2001		RECORD on appeal returned from Supreme Court of the U.S. re appeal [133-1] (mg) (Entered: 12/10/2001)
12/07/2001	143	MOTION by defts to postpone trial (jb) (Entered: 12/10/2001)
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12/20/2001	145	RESPONSE by pltf Brentwood Academy to motion to postpone trial [143-1] (jb) (Entered: 12/20/2001)
12/21/2001	146	ORDER by Judge Todd J. Campbell; defts' motion to postpone trial [143-1] is granted in part and denied in part; the trial is continued for a short period; Bench Trial is reset for 9:00 8/5/02; Joint Proposed Pretrial Order ddl is reset for 7/17/02; Pretrial Conference is reset for 9:00 7/22/02; by 7/8/02 the ptys shall file any mtns in limine and any mtns objecting to expert testimony; any responses to such mtns shall be filed by 7/17/02; the ptys shall file pretrial briefs with the Court at least one week before the trial (cc: all counsel) (EOD 12/21/01) (jb) (Entered: 12/21/2001)
12/27/2001	147	REPLY by defts in support of motion to postpone trial [143-1] (vh) (Entered: 12/28/2001)
01/11/2002	148	MOTION by defts to dismiss (jb) (Entered: 01/11/2002)
01/11/2002	149	MEMORANDUM by defts in support of motion to dismiss [148-1] (jb) (Entered: 01/11/2002)
01/28/2002		PROPOSED Agreed Order allowing the pltf until 3/4/02 to respond to defts' motion to dismiss pltf's antitrust claim(s) (jb) (Entered: 01/29/2002)

01/29/2002	150	AGREED ORDER by Judge Todd J. Campbell allowing the pltf until 3/4/02 to respond to defts' motion to dismiss [148-1] (cc: all counsel) (EOD 1/30/02) (jb) (Entered: 01/30/2002)
02/13/2002	151	LETTER from Supreme Court of the United States to Clerk of 6CCA advising the petition for a writ of certiorari was filed on 1/28/02, No. 01-1117 (gi) (Entered: 02/14/2002)
03/04/2002	152	MEMORANDUM by pltf Brentwood Academy in opposition to TSSAA's motion to dismiss antitrust claim [148-1] (w/attached exh. A) (jb) (Entered: 03/04/2002)
03/13/2002	153	ORDER by Judge Todd J. Campbell denying motion to dismiss [148-1] without prejudice to raising the same issues in a mtn for summary judgment. EOD 3/13/02 (cc: all counsel) (gi) (Entered: 03/13/2002)
03/14/2002	154	REPLY by defts in support of motion to dismiss antitrust claims [148-1] (jb) (Entered: 03/15/2002)
04/19/2002	155	MOTION by defts for partial summary judgment (jb) (Entered: 04/19/2002)
04/19/2002	156	MEMORANDUM OF LAW by defts in support of motion for partial summary

		judgment [155-1] (jb) (Entered: 04/19/2002)
04/19/2002	157	STATEMENT of undisputed facts by defts in support of motion for partial summary judgment regarding pltf's Federal AntiTrust Claims [155-1] (w/attached addendum A & B) (jb) (Entered: 04/19/2002)
04/22/2002	158	NOTICE from the US Supreme Court that the petition for a writ of certiorari is denied (af) (Entered: 04/22/2002)
04/26/2002		PROPOSED Agreed Order re ddl to complete expert witness depositions (jb) (Entered: 04/29/2002)
05/02/2002	159	AGREED ORDER by Judge Todd J. Campbell: The ptys shall complete any and all expert witness depositions by not later than June 14, 2002. (cc: all counsel) (EOD 5/3/02) (jb) (Entered: 05/03/2002)

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05/06/2002	161	MOTION by pltf Brentwood Academy for leave to propound additional interrogatories on defts (w/attached exhs. A-D; exh. D-Proposed Order) (jb) (Entered: 05/07/2002)

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05/10/2002	163	SECOND MOTION by defts to postpone trial (jb) (Entered: 05/13/2002)
05/13/2002	164	RESPONSE by defts to pltf's motion for leave to propound additional interrogatories on defts [161-1] (w/attached exh. A) (jb) (Entered: 05/14/2002)

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05/16/2002	166	ORDER by Judge Todd J. Campbell: Parties are to participate in mediation pursuant to Rules 20-28 of Local Rules of Court. The Magistrate Judge shall issue all necessary orders to implement the mediation. EOD 5/16/02 (cc: all counsel) (gi) Modified on 05/22/2002 (Entered: 05/16/2002)
05/20/2002	167	ORDER by Judge Todd J. Campbell: Status Conference set for 3:00 5/22/02 (cc: all counsel) (EOD 5/20/02) (jb) (Entered: 05/20/2002)
05/20/2002	168	MOTION by pltf Brentwood Academy for leave to present additional experts (w/attached proposed order and notice of filing expert witness disclosures) (jb) Modified on 05/21/2002 (Entered: 05/21/2002)
05/21/2002	169	ORDER by Magistrate Judge Juliet E. Griffin: Status Conference is scheduled on 5/22/02 before Judge Campbell re

Order DE #167. Counsel for the ptys shall appear before Judge Griffin after the conclusion of the 5/22/02 status conference to address mediation options. (cc: all counsel) (EOD 5/21/02) (jb) (Entered: 05/21/2002)

05/21/2002 170 RESPONSE by pltf to defts' second motion to postpone trial [163-1] (jb) (Entered: 05/22/2002)

* * *

05/23/2002 173 ORDER by Judge Todd J. Campbell: Hearing held 5/22/02. Defts' motion for partial summary judgment [155-1] is taken under advisement pending the filing of a response in accordance with this Order. Pltf's motion for leave to propound additional interrogatories on defts [161-1] is granted, and pltf shall serve a maximum of 75 additional interrogatories to defts. Defts' second motion to postpone trial [163-1] is granted. Defts' motion for an extension of time until 8/12/02 to respond to discovery requests [165-1] is granted in part and denied in part. Pltf shall file its response to defts' pending motion for partial summary judgment [155-1] by 8/15/02. Defts shall file any reply on or before 8/30/02. Pltf's motion for leave to present additional experts [168-1] is granted for the reasons set forth at the Status Conference. Bench Trial is reset

for 9:00 12/11/02; Joint Proposed Pretrial Order ddl is reset for 11/20/02; Pretrial Conference is reset for 1:00 11/25/02; Pretrial Briefs shall be filed one week before the trial; Discovery ddl is reset for 8/1/02; Dispositive Motion filing ddl is reset for 8/30/02. Case referred to Magistrate Judge Juliet E. Griffin for determination of all non-dispositive motions. The Magistrate Judge shall deny any discovery motion which does not comply with Local Rule 9(e). (cc: all counsel) (EOD 5/23/02) (jb) (Entered: 05/23/2002)

* * *

05/23/2002	175	EXPERT WITNESS DISCLOSURE STATEMENT of John Van Mol by pltf Brentwood Academy re [174-1] (w/attached exhs. A-C) (jb) (Entered: 05/23/2002)
05/24/2002	176	ORDER by Magistrate Judge Juliet E. Griffin: Status conference held 5/22/02. By 6/7/02 deft's counsel shall confer with deft Carter and the Board of Control of deft TSSAA and provide to pltf's counsel a point-by-point response to pltf's proposal drafted a year ago. Parties shall engage in mediation to be completed by 8/9/02. Telephone status conference set for 3:00 on 6/17/02. EOD 5/24/02 (cc: all counsel) (gi) (Entered: 05/24/2002)

* * *

06/19/2002	179	NOTICE by defts of filing expert witness disclosures of Allen L. Sack; George H. Sage; and John E. Roberts. (w/ att'd stmts) (dlt) (Entered: 06/20/2002)
06/19/2002	180	NOTICE by defts of filing expert witness disclosures of Murray A. Sperber; Sharon Kay Stoll; and C. Thomas McMillen. (w/ att'd stmts) (dlt) (Entered: 06/20/2002)

* * *

07/08/2002	182	MOTION by pltf Brentwood Academy for clarification or, alternatively for leave to propound additional interrogatories on defts (w/attached exhs. A & B) (jb) (Entered: 07/09/2002)
07/08/2002	183	MOTION by pltf Brentwood Academy for leave for second deposition of deft Ronnie Carter (w/attached exhs. A-C) (jb) (Entered: 07/09/2002)
07/10/2002	184	RESPONSE by defts to motion for leave for second deposition of deft Ronnie Carter [183-1] (w/attached exhs. A-C) (jb) (Entered: 07/11/2002)

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07/12/2002	185	AGREED ORDER by Magistrate Judge Juliet E. Griffin: Discovery ddl is reset for 8/30/02 ; Pltf's motion for extension of discovery to 8/30/02 [181-1] and motion for leave for second deposition of deft Ronnie Carter [183-1] is denied as moot (cc: all counsel) (EOD 7/15/02) (jb) (Entered: 07/15/2002)

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07/19/2002	187	MOTION by pltf for leave to amend complaint (w/attached original amended complaint) (jb) (Entered: 07/22/2002)
07/19/2002	188	MEMORANDUM OF FACTS AND LAW by pltf in support of motion for leave to amend complaint [187-1] (jb) (Entered: 07/22/2002)
07/23/2002	189	REVISED MOTION by pltf Brentwood Academy for leave to amend complaint (w/attached exh. A-First Amended Complaint w/No Signature) (jb) Modified on 07/23/2002 (Entered: 07/23/2002)
07/25/2002	190	ORDER by Magistrate Judge Juliet E. Griffin finding the motion for clarification [182-1] or for leave to propound additional interrogatories on defts [182-2] moot as counsel for defts advised the Court this matter had been resolved. EOD 7/26/02 (cc: all counsel) (gi) (Entered: 07/26/2002)

07/26/2002	191	RESPONSE by defts TN Secondary School & Ronnie Carter to motion for leave to amend complaint [189-1] (jb) (Entered: 07/29/2002)
08/07/2002	192	MOTION by pltf Brentwood Academy to compel discovery . (dlt) (Entered: 08/08/2002)
08/07/2002	193	MEMORANDUM by pltf Brentwood Academy in support of motion to compel discovery [192-1]. (w/ att'd exhibit A-C) (dlt) (Entered: 08/08/2002)
08/07/2002	194	MOTION by pltf Brentwood Academy to shorten defts' response time on mtn to compel discovery and for hearing on mtn to compel . (dlt) (Entered: 08/08/2002)
08/08/2002	195	RESPONSE by defts to motion to shorten defts' response time on mtn to compel discovery [194-1] and for hearing on mtn to compel [194-2]; w/attached Exhibits A-B (rls) (Entered: 08/08/2002)
08/08/2002	196	ORDER by Judge Todd J. Campbell granting revised motion for leave to amend complaint [189-1]. Pltf's motion for leave to amend complaint [187-1] is moot. (cc: all counsel) (EOD 8/9/02) (jb) (Entered: 08/09/2002)
08/09/2002	197	ORDER by Magistrate Judge Juliet E. Griffin denying motion to compel discovery [192-1] with leave to refile in

compliance with Local Rule 9(e) (cc: all counsel) (EOD 8/9/02) (jb) (Entered: 08/09/2002)

08/15/2002 198 MOTION by defts for leave to call additional and rebuttal expert witnesses (w/attached exhs. A-C) (jb) (Entered: 08/15/2002)

08/15/2002 199 MEMORANDUM OF LAW by defts in support of motion for leave to call additional and rebuttal expert witnesses [198-1] (jb) (Entered: 08/15/2002)

08/15/2002 200 MEMORANDUM by pltf in opposition to defts' motion for partial summary judgment on Federal Antitrust Claims [155-1] (jb) (Entered: 08/16/2002)

08/15/2002 201 RESPONSE by pltf to defts' statement of undisputed facts in support of motion for partial summary judgment on Federal Anti-Trust Claims [157-1] (jb) (Entered: 08/16/2002)

08/15/2002 202 STATEMENT of undisputed facts by pltf in support of response in opposition to defts' motion for partial summary judgment on Federal Antitrust Claims [200-1] (jb) (Entered: 08/16/2002)

08/26/2002 203 REPLY by defts to pltf's response to defts' motion for partial summary judgment on antitrust claims [155-1]

(w/attached exhs. A-C) (jb) (Entered: 08/27/2002)

08/26/2002 204 RESPONSE by defts to BrentWood Academy's statement of undisputed facts in support of opposition to defts' motion for partial summary judgment on Federal Antitrust Claims [202-1] (jb) (Entered: 08/27/2002)

08/27/2002 205 FIRST AMENDED COMPLAINT [1-1] by pltf Brentwood Academy (jb) (Entered: 08/28/2002)

08/28/2002 206 RENEWED MOTION by pltf Brentwood Academy to compel and for expedited hearing (w/attached exhs. A-D) (jb) (Entered: 08/29/2002)

08/28/2002 207 JOINT DISCOVERY DISPUTE STATEMENT by pltf & defts re renewed motion to compel [206-1] and for expedited hearing [206-2] (w/attached exhs. 1 & 2) (jb) (Entered: 08/29/2002)

08/28/2002 208 MOTION by pltf Brentwood Academy for oral argument on its renewed motion to compel & for expedited hearing (jb) (Entered: 08/29/2002)

08/29/2002 209 ORDER by Magistrate Judge Juliet E. Griffin: The order entered 5/24/02 DE #176 is modified as follows: The ptys shall participate in a mediation to be conducted by Professor Perry Wallace to

begin on 9/24/02. Counsel for the ptys shall convene a telephone conference call with Professor Wallace at 3:00 on 8/30/02 at 202-274-4243 to address arrangement for the mediation. As a housekeeping matter, the pltf's motion to shorten defts' response time on mtn to compel discovery [194-1] and for a hearing on mtn to compel [194-2] is rendered moot. (cc: all counsel, xc: rm) (EOD 8/29/02) (jb) (Entered: 08/29/2002)

08/29/2002 210 RESPONSE by pltf Brentwood Academy in opposition to defts' motion for leave to call additional and rebuttal expert witnesses [198-1] (w/attached exh. 1) (jb) (Entered: 08/30/2002)

* * *

09/04/2002 211 ORDER by Magistrate Judge Juliet E. Griffin: Hearing held 8/30/02. Pltf's motion for oral argument on its renewed motion to compel & for expedited hearing [208-1] and motion for expedited hearing [206-2] were granted. The pltf's motion to compel [206-1] is granted to the extent set forth in this Order based on discussions with counsel on 8/30/02. (cc: all counsel) (EOD 9/4/02) (jb) (Entered: 09/04/2002)

09/04/2002 212 AGREED ORDER by Judge Todd J. Campbell: Dispositive Motion filing deadline is reset for 9/17/02. Responses

		to dispositive motions is reset for 10/7/02. Replies is reset for 10/14/02. Service of all materials to be by personal delivery or fax on the day of filing. (cc: all counsel) (EOD 9/5/02) (jb) (Entered: 09/05/2002)
09/05/2002	213	ORDER by Magistrate Judge Juliet E. Griffin: The portion of the pltf's motion to compel [206-1] [206-2] seeking sanctions for the defts' failure to cooperate and legal fees and expenses associated with bringing the motion to compel is denied. (cc: all counsel) (EOD 9/6/02) (jb) (Entered: 09/06/2002)
09/06/2002	214	REPLY by defts to response to motion for leave to call additional and rebuttal expert witnesses [198-1] (jb) (Entered: 09/09/2002)
09/10/2002	215	ANSWER by defts TN Secondary School & Ronnie Carter to complaint [205-1] [1-1] (jb) (Entered: 09/11/2002)
09/13/2002	216	MOTION by defts TN Secondary School & Ronnie Carter for review to appeal the September 4, 2002 Order DE #211 (w/attached exhs. 1 & 2) (jb) (Entered: 09/16/2002)
09/13/2002	217	BRIEF by defts TN Secondary School & Ronnie Carter in support of motion for review to appeal the September 4, 2002 Order DE #211 [216-1] (jb) (Entered: 09/16/2002)

09/17/2002	218	MOTION by defts TN Secondary School & Ronnie Carter for summary judgment (jb) (Entered: 09/18/2002)
09/17/2002	219	BRIEF by defts TN Secondary School & Ronnie Carter in support of motion for summary judgment [218-1] (jb) (Entered: 09/18/2002)
09/17/2002	220	STATEMENT of undisputed facts by defts TN Secondary School & Ronnie Carter in support of motion for summary judgment [218-1] (jb) (Entered: 09/18/2002)
09/17/2002	221	NOTICE by defts TN Secondary School & Ronnie Carter of filing the attached copy of deposition of Fred S. McChesney taken on 8/23/02 (jb) (Entered: 09/18/2002)
09/17/2002	222	SECOND MOTION by pltf Brentwood Academy for partial summary judgment (jb) (Entered: 09/18/2002)
09/17/2002	223	MEMORANDUM by pltf Brentwood Academy in support of motion for partial summary judgment [222-1] (jb) (Entered: 09/18/2002)
09/17/2002	224	STATEMENT of undisputed facts by pltf Brentwood Academy in support of its second motion for partial summary judgment [222-1] (w/attached exhs. A-I) (jb) (Entered: 09/18/2002)

09/18/2002	225	MOTION by pltf Brentwood Academy for oral argument on its second motion for partial summary judgment (jb) (Entered: 09/18/2002)
09/18/2002	226	ORDER by Judge Todd J. Campbell granting defts' motion for leave to call additional and rebuttal expert witnesses [198-1]. Defts may call Professor Murray Sperber, Professor Sharon Stoll, and Mr. C. Thomas McMillen as witnesses at the trial of this action. (cc: all counsel) (EOD 9/18/02) (jb) (Entered: 09/18/2002)
09/20/2002	227	MOTION by pltf Brentwood Academy for an extension of time until 10/28/02 to respond to defts' motion for review (jb) (Entered: 09/23/2002)
09/23/2002	228	ORDER by Judge Todd J. Campbell granting Brentwood Academy's motion for an extension of time until 10/28/02 to respond to defts' motion for review [216-1] [227-1] (cc: all counsel) (EOD 9/24/02) (jb) (Entered: 09/24/2002)
09/23/2002	229	RESPONSE by defts to pltf's motion for an extension of time until 10/28/02 to respond to defts' motion for review [227-1] (jb) (Entered: 09/24/2002)
10/02/2002	230	PRELIMINARY RESPONSE by pltf to defts' motion for review [216-1] (w/attached exhs. A-C) (jb) (Entered: 10/03/2002)

10/04/2002	231	MOTION by defts for leave to file a reply in support of motion for review (jb) (Entered: 10/07/2002)
10/07/2002	232	ORDER by Judge Todd J. Campbell granting motion for leave to file a reply in support of motion for review [231-1]. Defts shall have until 10/14/02 to file a reply to pltf's preliminary response to the motion for review [216-1] (cc: all counsel) (EOD 10/7/02) (jb) (Entered: 10/07/2002)
10/07/2002	233	MOTION by defts to strike (jb) (Entered: 10/07/2002)
10/07/2002	234	RESPONSE by pltf Brentwood Academy to defts' motion for summary judgment [218-1] (w/attached exh. 1) (jb) (Entered: 10/08/2002)
10/07/2002	235	RESPONSE by pltf Brentwood Academy to defts' statement of undisputed facts [220-1] (jb) (Entered: 10/08/2002)
10/07/2002	236	MEMORANDUM by defts in opposition to pltf's motion for partial summary judgment [222-1] on pltf's antitrust claims (jb) (Entered: 10/08/2002)
10/07/2002	237	RESPONSE by defts to Brentwood Academy's statement of undisputed facts in support of its second motion for partial

summary judgment [224-1] (jb) (Entered: 10/08/2002)

10/07/2002 238 NOTICE by defts of filing the attached affidavit of Ronnie Carter; and copy of excerpts from 8/23/02 deposition of Fred N. McChesney in support of defts' response to the pltf's motion for partial summary judgment (jb) (Entered: 10/08/2002)

10/07/2002 239 AFFIDAVIT of Ronnie Carter re [236-1] (jb) (Entered: 10/08/2002)

10/07/2002 240 MOTION by defts to strike the affidavits of Billy Lynch and Richard Anderson (jb) (Entered: 10/08/2002)

10/07/2002 241 BRIEF by defts in support of motion to strike the affidavits of Billy Lynch and Richard Anderson [240-1] (w/attached exh. A) (jb) (Entered: 10/08/2002)

10/07/2002 242 MOTION by defts to strike undisputed facts numbered 9, 16-17, 19-20, 47-59, and 83-84 (jb) (Entered: 10/08/2002)

10/07/2002 243 BRIEF by defts in support of motion to strike undisputed facts numbered 9, 16-17, 19-20, 47-59, and 83-84 [242-1] (w/attached exhs. A & B) (jb) (Entered: 10/08/2002)

10/11/2002 244 REPLY by pltf to response to motion for partial summary judgment [222-1]

		(w/attachments) (gi) (Entered: 10/15/2002)
10/11/2002	245	REPLY by defts to response to motion for summary judgment [218-1] (gi) (Entered: 10/15/2002)
10/11/2002	246	REPLY by defts to response to motion for review to appeal the September 4, 2002 Order DE #211 [216-1] (gi) (Entered: 10/15/2002)
10/15/2002	247	APPENDIX of Authorities (1-5) filed by pltf in support of second mtn for partial summary judgment [222-1] (gi) (Entered: 10/15/2002)
10/21/2002	248	RESPONSE by pltf Brentwood Academy to defts' motion to strike undisputed facts numbered 9, 16-17, 19-20, 47-59, and 83-84 [242-1] (w/attached exh. A) (jb) (Entered: 10/22/2002)
10/21/2002	249	RESPONSE by pltf Brentwood Academy to defts' motion to strike the affidavits of Billy Lynch and Richard Anderson [240-1] (jb) (Entered: 10/22/2002)
10/21/2002	250	NOTICE by pltf Brentwood Academy of filing the attached copy of deposition of Hulon Watson dated 5/12/02 (jb) (Entered: 10/22/2002)

10/22/2002	251	ORDER by Judge Todd J. Campbell: Pending before the Court, among other things, is defts' motion for partial summary judgment [155-1] regarding certain antitrust claims. The briefs filed by the ptys raise the issue of whether the TSSAA is a "political subdivision of the state of Tennessee" for antitrust law purposes. (DE Nos. 156, 200 and 203) The Atty General of Tennessee is advised of this litigation in which the State may have an interest. The Clerk shall serve a copy of this Order on Tennessee Atty Gen Paul Summers. By 11/12/02, the Atty Gen shall file any notice of appearance or motion to intervene in the case. (cc: all counsel) (EOD 10/22/02) (jb) (Entered: 10/22/2002)
10/23/2002	252	MOTION by defts for leave to file reply to pltf's response to defts' motion to strike undisputed facts numbered 9, 16-17, 19-20, 47-59, and 83-84 (jb) (Entered: 10/24/2002)
10/24/2002	253	ORDER by Judge Todd J. Campbell granting defts' motion for leave to file reply to pltf's response to defts' motion to strike undisputed facts numbered 9, 16-17, 19-20, 47-59, and 83-84 [252-1] (cc: all counsel) (EOD 10/24/02) (jb) (Entered: 10/24/2002)
10/25/2002	254	ORDER by Judge Todd J. Campbell granting deft's motion for partial

summary judgment [155-1] and all antitrust claims are dismissed. The trial remains scheduled for 12/11/02. (cc: all counsel, Atty General of TN) (EOD 10/25/02) (jb) Modified on 10/25/2002 (Entered: 10/25/2002)

10/25/2002 255 ORDER by Judge Todd J. Campbell denying defts' motion for summary judgment [218-1]. By contemporaneous Order [254-1], the Court has granted defts' motion for partial summary judgment [155-1] and dismissed pltf's antitrust claims. The pending motion for summary judgment is moot as to Count IV (antitrust). Th Court has previously denied a motion for summary judgment by the defts on Count III (procedural due process) and Count VI (unfair, unreasonable, and oppressive action under state law) because there are genuine issues of material fact in dispute. The material facts remain in dispute. The motion for summary jdugment is denied as to Count III and Count IV. The motion as to Count VII (equal protection) is denied because discovery has not been completed on that issue. The motion as to Count II (substantive due process) is denied bacause it is readily apparent from the voluminous record that there are material facts in dispute on the issue. Ronnie Carter's motion for summary judgment is denied. The trial remains

scheduled for 12/11/02. (cc: all counsel) (EOD 10/25/02) (jb) (Entered: 10/25/2002)

10/25/2002 256 ORDER by Judge Todd J. Campbell denying Brentwood Academy's second motion for partial summary judgment [222-1]. Defts' motion to strike the affidavits of Billy Lynch and Richard Anderson [240-1] and motion to strike undisputed facts numbered 9, 16-17, 19-20, 47-59, and 83-84 [242-1] are moot. Brentwood Academy's motion for oral argument on its second motion for partial summary judgment [225-1] is denied.(cc: all counsel) (EOD 10/25/02) (jb) (Entered: 10/25/2002)

10/25/2002 257 ORDER by Judge Todd J. Campbell denying defts' motion to strike [233-1] (cc: all counsel) (EOD 10/25/02) (jb) (Entered: 10/25/2002)

10/28/2002 258 RESPONSE by pltf Brentwood Academy to defts' motion for review to appeal the September 4, 2002 Order DE #211 [216-1] (w/attached exhs. A-C) (jb) (Entered: 10/29/2002)

10/28/2002 259 ORDER by Judge Todd J. Campbell denying motion for review to appeal the September 4, 2002 Order DE #211 [216-1]. Defts shall supplement the interrogatory responses required by the Magistrate Judge's Order [211-1] no later

		than 11/15/02. (cc: all counsel) (EOD 10/29/02) (jb) (Entered: 10/29/2002)
11/08/2002	260	OBJECTIONS by defts to the testimony of pltf's damages experts. (dlt) (Entered: 11/12/2002)
11/08/2002	261	OBJECTIONS by defts to the testimony of pltf's school choice experts. (dlt) (Entered: 11/12/2002)
11/08/2002	262	MOTION by pltf Brentwood Academy to reconsider orders granting defts' mtn for partial summary judgment & denying pltf's second mtn for partial summary judgment on Federal Antitrust Claims . (dlt) (Entered: 11/12/2002)
11/08/2002	263	MEMORANDUM by pltf Brentwood Academy in support of motion to reconsider orders granting defts' mtn for partial summary judgment & denying pltf's second mtn for partial summary judgment on Federal Antitrust Claims [262-1]. (w/ attachments) (dlt) (Entered: 11/12/2002)
11/08/2002	264	MOTION by pltf Brentwood Academy in limine to exclude the expert testimony of C. Thomas McMillen and George H. Sage . (dlt) (Entered: 11/12/2002)
11/08/2002	265	MEMORANDUM by pltf Brentwood Academy in support of motion in limine to exclude the expert testimony of C.

Thomas McMillen and George H. Sage [264-1]. (w/ att'd exhibits A-B) (dlt) (Entered: 11/12/2002)

11/08/2002 266 MOTION by pltf Brentwood Academy in limine to exclude ex post facto evidence of defts' alleged governmental interests . (dlt) (Entered: 11/12/2002)

11/08/2002 267 MEMORANDUM by pltf Brentwood Academy in support of motion in limine to exclude ex post facto evidence of defts' alleged governmental interests [266-1]. (w/ att'd exhibit A) (dlt) (Entered: 11/12/2002)

11/08/2002 268 MOTION by pltf Brentwood Academy for oral argument on pltf's mtns in limine and mtn to reconsider . (dlt) (Entered: 11/12/2002)

11/12/2002 269 ORDER by Judge Todd J. Campbell denying motion to reconsider orders granting defts' mtn for partial summary judgment & denying pltf's second mtn for partial summary judgment on Federal Antitrust Claims [262-1] (cc: all counsel) (EOD 11/13/02) (jb) (Entered: 11/13/2002)

11/12/2002 270 ORDER by Judge Todd J. Campbell denying motion for oral argument on pltf's mtns in limine and mtn to reconsider [268-1]. All motions in limine will be considered at the pretrial

		conference scheduled for 11/25/02. (cc: all counsel) (EOD 11/13/02) (jb) (Entered: 11/13/2002)
11/20/2002	271	EXHIBIT list by defts (jb) (Entered: 11/21/2002)
11/20/2002	272	WITNESS list submitted by defts (jb) (Entered: 11/21/2002)
11/20/2002	273	RESPONSE by defts to pltf's motion in limine to exclude the expert testimony of C. Thomas McMillen and George H. Sage [264-1] (jb) (Entered: 11/21/2002)
11/20/2002	274	RESPONSE by defts to motion in limine to exclude ex post facto evidence of defts' alleged governmental interests [266-1] (jb) (Entered: 11/21/2002)
11/20/2002	275	WITNESS list submitted by pltf Brentwood Academy (jb) (Entered: 11/21/2002)
11/20/2002	276	EXHIBIT list by pltf Brentwood Academy (jb) (Entered: 11/21/2002)
11/20/2002		PROPOSED Joint Proposed Pre-Trial Order (jb) (Entered: 11/21/2002)
11/20/2002	277	RESPONSE by pltf Brentwood Academy to defts' objection to testimony of "damages" experts [260-1] (w/attached exhs. A & B) (jb) (Entered: 11/21/2002)

11/20/2002	278	RESPONSE by pltf Brentwood Academy to defts' objection to testimony of pltf's experts Guthrie, Goldring and Obel-Omia [261-1] (jb) (Entered: 11/21/2002)
11/22/2002	279	JOINT PRE-TRIAL ORDER approved by Judge Todd J. Campbell: This action is assigned for a bench trial beginning at 9:00 a.m. on 12/11/02. The estimated length of trial is seven business days, from 12/11/02 to 12/19/02. If not concluded by 12/19/02, the trial will resume on 1/2/03, and continue until completed. The ptys agree that there is some possibility of settlement prior to trial. (cc: all counsel) (EOD 11/22/02) (jb) (Entered: 11/22/2002)
11/23/2002	280	MOTION by pltf for leave to contact former TSSAA employees and board members (w/attachment) (jb) (Entered: 11/25/2002)

* * *

11/25/2002	282	ORDER by Judge Todd J. Campbell: Pretrial Conference held 11/25/02. For the reasons explained from the bench, pltf's motion in limine to exclude ex post facto evidence of defts' alleged governmental interests [266-1] is denied. Defts' objection to the testimony of pltf's "damages" expert [260-1] is denied. Defts' objection to the testimony of pltf's

		"School Choice" experts [261-1] is denied. Pltf's motion in limine to exclude the expert testimony of C. Thomas McMillen and George H. Sage [264-1] is granted in part and denied in part. Pltf's motion for leave to contact former TSSAA employees and board members [280-1] is granted with limitation. Pretrial Briefs ddl set 12/4/02. (cc: all counsel) (EOD 11/25/02) (jb) (Entered: 11/25/2002)
11/27/2002	283	TRANSCRIPT filed of the proceedings-motion rulings and pretrial conference before the Hon. Todd J. Campbell on 11/25/02; CR: James A. Spence (jb) (Entered: 11/27/2002)
11/27/2002	284	ORDER by Magistrate Judge Juliet E. Griffin: There are no matters pending before the Magistrate Judge. All ddls have passed. There are no pending motions. The Clerk is directed to forward the portions of the file that were in the office of the undersigned to the Hon. Todd J. Campbell prefatory to the 12/11/02 trial. There will be no further proceedings before the Magistrate Judge in this case. (cc: all counsel) (EOD 12/2/02) (jb) (Entered: 12/02/2002)
12/03/2002	285	SUPPLEMENTAL LIST by defts of exhibits re [271-1] (jb) (Entered: 12/03/2002)

12/03/2002	286	MOTION by pltf Brentwood Academy to modify trial schedule (jb) (Entered: 12/04/2002)
12/04/2002	287	ORDER by Judge Todd J. Campbell granting in part and denying in part motion to modify trial schedule [286-1]: To hold Court on Saturday, 12/14/02, is denied; to extend the trial through 12/20/02 is granted, if necessary. EOD 12/4/02 (cc: all counsel) (gi) (Entered: 12/04/2002)
12/04/2002	288	PRETRIAL BRIEF FILED by defts (jb) (Entered: 12/05/2002)
12/04/2002	289	RESPONSE by defts to motion to modify trial schedule [286-1] (jb) (Entered: 12/05/2002)
12/04/2002	290	FINAL PRE-TRIAL MEMORANDUM FILED by pltf Brentwood Academy (w/attached exhs. A-E) (jb) (Entered: 12/05/2002)
12/06/2002	291	MOTION by pltf Brentwood Academy to exclude defts' trial exhibits on collegiate or professional athletic recruiting (w/collective attachment one-five) (jb) Modified on 12/06/2002 (Entered: 12/06/2002)
12/06/2002	292	SUPPLEMENTAL TRIAL EXHIBIT list by pltf Brentwood Academy (jb) (Entered: 12/09/2002)

12/09/2002	293	RESPONSE by defts to pltf's motion to exclude defts' trial exhibits on collegiate or professional athletic recruiting [291-1] (jb) (Entered: 12/10/2002)
12/10/2002	294	STIPULATED TRIAL EXHIBITS list by pltf & defts (jb) (Entered: 12/11/2002)
12/11/2002	295	CLERK'S RESUME: Bench Trial held 12/11-13/02, 12/16-20/02, 12/30-31/02 ; w/attached exhibit and witness list; C/R: Jim Spence (jb) (Entered: 01/09/2003)
01/13/2003	296	MEMORANDUM OF THE COURT (cc: all counsel) (EOD 1/13/03) (jb) (Entered: 01/13/2003)
01/13/2003	297	ORDER by Judge Todd J. Campbell: For the reasons described in the accompanying memorandum [296-1], the Court finds that judgment shall enter for Brentwood Academy against the TSSAA on the First Amendment "as applied" claim; the Fourteenth Amendment Substantive Due Process "as applied" claim; and the Fourteenth Amendment Procedural Due Process claim. Judgment shall enter for Brentwood Academy against Ronnie Carter, individually, on the Fourteenth Amendment Procedural Due Process claim. Judgment shall enter for Ronnie Carter, individually, on the First Amendment "as applied" claim and the Fourteenth Amendment Substantive Due Process "as applied" claim. It is

unnecessary for the Court to reach the Fourteenth Amendment Equal Protection "as written and as applied" claim or the Substantive Due Process "as written" claim. The Court declines to take supplemental jurisdiction over the state law claim. As relief for the above constitutional violations, the 8/23/97 penalties (Pltf's Exh 88) imposed by the TSSAA against Brentwood Academy are declared void and enjoined. Terminating case. (cc: all counsel) (EOD 1/13/03) (jb) (Entered: 01/13/2003)

02/10/2003 298 NOTICE OF APPEAL by deft TN Secondary School, deft Ronnie Carter from Dist. Court decision [297-2] (mk) (Entered: 02/10/2003)

02/10/2003 299 RECEIVED filing fee in the amt of $105, receipt no. 90192 (mk) (Entered: 02/10/2003)

* * *

02/11/2003 300 LETTER from Appeals Clerk to all counsel re: designation of record (mk) (Entered: 02/11/2003)

02/11/2003 SR Record on Appeal sent to 6th CCA re [298-1] (mk) (Entered: 02/11/2003)

* * *

02/24/2003	311	NOTICE OF CROSS APPEAL by pltf Brentwood Academy from Dist. Court decision [254-1] (mk) (Entered: 02/26/2003)
02/25/2003	307	MOTION by pltf Brentwood Academy to modify this Court's order of 2/19/03 pending appeal (mk) (Entered: 02/26/2003)

* * *

02/27/2003	312	RECEIVED filing fee in the amt of $105, hand receipt no. 36401 for cross appeal by Brentwood Academy (mk) (Entered: 02/28/2003)
02/28/2003		SR Record on Appeal sent to 6th CCA re [311-1] cross appeal of Brentwood Academy (mk) (Entered: 02/28/2003)
03/03/2003	313	NOTIFICATION by 6th CCA of Appellate Docket Number 03-5245 and assignment of Mary Patterson case mgr (mk) (Entered: 03/04/2003)
03/03/2003	314	RECEIVED filing fee in the amt of $105, receipt no. 90540 (duplicate of hand receipt) (mk) (Entered: 03/04/2003)
03/05/2003		REMARK: copy of transcript order form (mk) (Entered: 03/06/2003)
03/10/2003	315	RESPONSE by defts TN Secondary School and Ronnie Carter to pltf's mtn to

modify this Court's order of 2/19/03 pending appeal [307-1] (mk) (Entered: 03/11/2003)

03/10/2003 316 RESPONSE by defts TN Secondary School and Ronnie Carter to pltf's mtn to require defts to post bond pending appeal [308-1] (mk) (Entered: 03/11/2003)

03/13/2003 317 ORDER by Judge Todd J. Campbell denying mtn to require defts to post bond pending appeal [308-1] and denying mtn to modify this Court's order of 2/19/03 pending appeal [307-1] EOD 3/14/03 (cc: all counsel) (mk) (Entered: 03/14/2003)

03/17/2003 318 NOTIFICATION by 6th CCA of Appellate Docket Number 03-5278 and assignment of Mary Patterson as case mgr (mk) (Entered: 03/18/2003)

03/21/2003 319 DESIGNATION by defts of record on appeal with attached Exh A (mk) (Entered: 03/24/2003)

03/21/2003 320 DESIGNATION by pltf Brentwood Academy of designation of record on appeal with attached Exhs A & B (mk) Modified on 03/24/2003 (Entered: 03/24/2003)

04/23/2003 321 TRANSCRIPT filed of trial proceedings on 12/11/02 (vol 1) (mk) (Entered: 04/23/2003)

04/23/2003	322	TRANSCRIPT filed of trial proceedings before Judge Campbell on 12/12/02 (vol. 2) (mk) (Entered: 04/23/2003)
04/23/2003	323	TRANSCRIPT filed of trial proceedings before Judge Campbell on 12/13/02 (vol 3) (mk) (Entered: 04/23/2003)
04/23/2003	324	TRANSCRIPT filed of trial proceedings before Judge Campbell on 12/16/02 (vol. 4) (mk) (Entered: 04/23/2003)
04/23/2003	325	TRANSCRIPT filed of trial proceedings before Judge Campbell on 12/17/02 (vol. 5) (mk) (Entered: 04/23/2003)
04/23/2003	326	TRANSCRIPT filed of trial proceedings before Judge Campbell on 12/18/02 (vol. 6) (mk) (Entered: 04/23/2003)
04/23/2003	327	TRANSCRIPT filed of trial proceedings before Judge Campbell on 12/19/02 (vol. 7) (mk) (Entered: 04/23/2003)
04/23/2003	328	TRANSCRIPT filed of trial proceedings before Judge Campbell on 12/20/02 (vol. 8) (mk) (Entered: 04/23/2003)
04/23/2003	329	TRANSCRIPT filed of trial proceedings before Judge Campbell on 12/30/02 (vol.9) (mk) (Entered: 04/23/2003)
04/23/2003	330	TRANSCRIPT filed of trial proceedings before Judge Campbell on 12/31/02 (vol. 10) (mk) (Entered: 04/23/2003)

03/17/2006	331	USCA INFORMATION COPY AND JUDGMENT as to [298] and [311]: The judgment of the district court is affirmed in part, reversed in part, and the case is remanded for further proceedings consistent with the opinion of this court. (gi,) Modified on 3/22/2006 (mk,). (Entered: 03/21/2006)
07/11/2006	332	ORDER of USCA as to [298] [311] notice of appeal denying mtn for rehearing en banc (mk,) Modified on 7/12/2006 (mk,). (Entered: 07/11/2006)
07/11/2006	333	MANDATE of USCA as to [311] Notice of Appeal filed by Brentwood Academy, [298] Notice of Appeal filed by Tennessee Secondary School Athletic Association, Ronnie Carter (mk) (Entered: 07/12/2006)

* * *

09/28/2006	339	NOTICE from US Supreme Court that petition for writ of certiorari was filed as case 06-427 (mk,) (Entered: 10/31/2006)
01/10/2007	340	ORDER: The Clerk is directed to close the file administratively pending conclusion of the current appeal . Signed by Judge Todd J. Campbell on 1/10/07. (km,) (Entered: 01/10/2007)

01/12/2007	341	NOTICE from Supreme Court that the petition for a writ of certiorari is granted. (km,) (Entered: 01/16/2007)

MEMORANDUM

TO: State Board of Education Members

FROM: C. Brent Poulton

DATE: May 12, 1989

RE: NOTES PERTAINING TO THE AGENDA FOR THE MAY BOARD MEETING

* * * *

II. REPORTS

* * * *

C. Annual Review and Report on Tennessee Secondary School Athletic Association Rules

The State Board delegates responsibility for high school competitive athletics to the TSSAA. Each year we reiterate this relationship, and ask the TSSAA for a report on the status of high school athletics. The event also provides an opportunity for you to ask any questions of TSSAA officials on the subject.

D. Report on Legislative Actions of 1989 Tennessee General Assembly

Chuck Cagle will summarize actions of the General Assembly.

* * * *

State of TennesseeState
Board of Education
400 Deaderick Street
Suite 200, Citizens Plaza
Nashville, Tennessee 37243-1050
615-741-2966

MEMORANDUM

TO: Members, State Board of Education

FROM: C. Brent Poulton
Executive Director

DATE: May 15, 1991

RE: NOTES FOR THE MAY 31, 1991 BOARD MEETING

* * * *

IV. Career Ladder Items

* * * *

D. Consideration of Rules and Regulations of the Tennessee Secondary School Athletic Association

Our rules call for an annual consideration by the Board of TSSAA rules and regulations. In effect, this amounts to reaffirmation of the Board's decision to delegate responsibility for management of secondary school athletics to TSSAA.

* * * *

State of TennesseeState
Board of Education
400 Deaderick Street
Suite 200, Citizens Plaza
Nashville, Tennessee 37243-1050
615-741-2966

MEMORANDUM

TO: Members, State Board of Education

FROM: C. Brent Poulton /s/ C. Brent Poulton
Executive Director

DATE: March 13, 1992

RE: NOTES FOR THE MARCH 27, 1992 BOARD MEETING

* * * *

V. **Other Items**

A. Consideration of Current Rules and Regulations of the Tennessee Secondary Schools Athletic Association

Each year we ask the Tennessee Secondary Schools Athletic Association (TSSAA) to present their rules and regulations for blanket approval by the State Board of Education. This is somewhat ceremonial, though important as a means of reminding the world that TSSAA works as an agent on behalf of the State Board of Education. We have asked Bob Baldridge to characterize changes in regulations which have occurred over the past year, and also to identify issues regarding athletics which the TSSAA is currently

concerned.

* * * *

State of TennesseeState
Board of Education
400 Deaderick Street
Suite 200, Citizens Plaza
Nashville, Tennessee 37243-1050
615-741-2966

MEMORANDUM

TO: Members, State Board of Education

FROM: C. Brent Poulton /s/ C. Brent Poulton
Executive Director

DATE: May 12, 1993

RE: Notes for May 21, 1993 Board Meeting

* * * *

III.B. TSSAA Rules and Regulations

Competitive athletics is a big part of the high school experience. The Tennessee Secondary School Athletic Association (TSSAA) manages these activities as sanctioned by the State Board of Education. This annual report keeps members informed of issues and changes in TSSAA policies.

* * * *

MINUTES
STATE BOARD OF EDUCATION
MAY 27, 1988

MEETING CALLED TO ORDER

The State Board of Education met in Room C1-124 of the Cordell Hull Bldg., Nashville, Tennessee, on May 27, 1988. Chairman Nelson ANDREWS called the meeting to order at 9:00 a.m.

****

III. OTHER ITEMS

****

H. REVIEW OF TENNESSEE SECONDARY SCHOOLS ATHLETIC ASSOCIATION RULES

Chuck CAGLE, SBE staff member, reviewed the status of Tennessee Secondary Schools Athletic Association, (TSSAA) with regard to Board rules. In 1984 the Board delegated to TSSAA the authority to promulgate rules relative to secondary school athletic events. That action called for a periodic review and approval of the operational authority delegated to TSSAA. The staff of the State Board of Education conducted the review and recommended that the TSSAA rules be approved and the TSSAA be designated to continue as the agency to govern secondary athletics for the Board.

ACTION: KEMP moved approval of the review of TSSAA rules and the continued designation of the TSSAA to govern athletics in Tennessee secondary schools. BOND seconded. ROLL CALL VOTE. MOTION PASSED UNANIMOUSLY.

* * * *

MINUTES
STATE BOARD OF EDUCATION
MAY 31, 1991

MEETING CALLED TO ORDER

The State Board of Education met in the offices of the State Board of Education, Nashville, Tennessee, on May 31, 1991. Chairman Nelson Andrews convened the meeting at 8 a.m.

***

IV. CAREER LADDER AND OTHER ITEMS

***

D. Consideration of Current Rules and Regulations of the Tennessee Secondary School Athletic Association

Bob BALDRIDGE, Associate Director of the Tennessee Secondary School Athletic Association, made a presentation on the current status of participation in secondary school athletic programs. He noted that over 90,000 students in grades 9-12 participate. Of those participating, 1/3 are girls and 2/3 are boys. In addition, a large number of students at the seventh and eighth grade level participate in middle school and junior high programs which are not directly regulated by TSSAA. The TSSAA organization has a budget of approximately $1 million and 330 high schools as members. He noted the advantages of TSSAA membership to schools in providing catastrophic insurance at a group rate which is more affordable than each individual school obtaining a policy.

BALDRIDGE noted that the main functions of TSSAA are in providing officials, setting the expectations for control of athletic events, and determining eligibility of student athletes. TSSAA rules also require that schools be in session in order for their students to participate in athletic events. This requirement has served as an incentive for many communities to finalize local school system budgets and to begin school in a timely fashion each fall.

Bob BYRD, SBE member, inquired about the procedures used by TSSAA in determining the site for state championship events in football and basketball. Bob BALDRIDGE reviewed the process used in determining the preference of member schools for the location of the state tournament events.

ACTION: Dick RAY moved approval of the current rules for TSSAA. Cynthia BOND seconded. ROLL CALL VOTE. MOTION PASSED UNANIMOUSLY.

* * * *

STATE BOARD OF EDUCATION UPDATE

State Board of Education 400 Deaderick Street Suite 200, Citizens Plaza Nashville, Tennessee 37243-1030 (615) 741-2966 Nelson Andrews, Chairman C. Brent Poulton, Exec. Director

The State Board of Education met on Friday, May 31, 1991. If you have any questions or would like to request copies of agenda items or reports approved by the Board, please call the State Board of Education office at (615) 741-2966.

***

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION. The Board approved the current rules and regulations of the Tennessee Secondary School Athletic Association. TSSAA officials also provided the Board with a report on current levels of participation by students in interscholastic athletic programs and areas of continuing activity and concern for secondary athletic programs within the state.

****

FOR IMMEDIATE RELEASE Contract:
Ken Nye State Board of Education (615) 741-2966

State of Tennessee
State Board of Education
400 Deaderick Street
Suite 200, Citizens Plaza
Nashville, Tennessee 37243-1030
615-741-2966

STATE BOARD OF EDUCATION MEETS

NASHVILLE, Tennessee - The State Board of Education will convene for a regular meeting on Friday, March 27, 1992.

***

The State Board of Education will also receive other reports and consider additional items at the meeting which will include: (1) new licensure standards for principals, (2) the annual plans for the School Board Training Academy for local school board members and the Tennessee Executive Development Program for superintendents, (3) the annual report on teacher candidate test results, (4) the rules and regulations of the Tennessee Secondary School Athletic Association, and (5) the six-year program plan for Adult Basic Education in Tennessee.

MINUTES
State Board of Education
March 27, 1992

MEETING CALLED TO ORDER

The State Board of Education met in the offices of the State Board of Education, Nashville, Tennessee, on March 27, 1992. Chairman Nelson Andrews convened the meeting at 8:00 a.m.

* * * *

V. OTHER ITEMS

A. Consideration of Current Rules and Regulations of the Tennessee Secondary Schools Athletic Association

Bob BALDRIDGE, Associate Executive Director for the Tennessee Secondary Schools Athletic Association (TSSAA), provided a report to the Board and reviewed the current status of the TSSAA Rules and Regulations. The current areas of activity and issues involved in secondary school athletic programs include the interest of middle schools in being regulated by TSSAA, the proposal by some public schools for separate state tournaments for private schools, the "red-shirting" of students during the middle grades, the resident requirement of students with divorced parents who reside in different school zones or districts, and the classification of schools. BALDRIDGE concluded his report by inviting board members to attend any TSSAA sponsored events or tournaments. He noted the high attendance at the recent state basketball tournaments for both girls and boys teams.

ACTION: Dick RAY moved approval of the rules and regulations of the Tennessee Secondary Schools Athletic Association. Bill SWAIN seconded. ROLL CALL VOTE. MOTION PASSED UNANIMOUSLY.

Adjourned: 11:00

* * * *

STATE BOARD OF EDUCATION UPDATE

State Board of Education
400 Deaderick Street
Suite 200, Citizens Plaza
Nashville, Tennessee 37243-1030
(615) 741-2966
Nelson Andrews, Chairman
C. Brent Poulton, Exec. Director

The State Board of Education met on Friday, March 27, 1992. If you have any questions or would like to request copies of agenda items or reports approved by the Board, please call the State Board of Education office at (615) 741-2966.

CURRENT RULES AND REGULATIONS OF THE TENNESSEE SECONDARY SCHOOLS ATHLETIC ASSOCIATION. The Board approved the current rules and regulations of the Tennessee Secondary Schools Athletic Association. TSSAA officials also provided the State Board of Education with a report on current areas of activity and issues involved in secondary school athletic programs in Tennessee. These areas include the interest of middle schools in being regulated by TSSAA, the proposal from some public schools for separate state tournaments for private schools, the "red-shirting" of students during the middle grades, the resident requirement for students with divorced parents who reside in different school zones or districts, and the classification of schools.

* * * *

MINUTES
State Board of Education
July 29, 1994

MEETING CALLED TO ORDER

The State Board of Education met on July 29, 1994 in Nashville, Tennessee, in the offices of the State Board of Education.

* * * *

VI. Other Items

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h. Remarks by Ronnie Carter, TSSAA

Brent Poulton, SBE Executive Director, said the Board invited Ronnie Carter, Executive Director of the Tennessee Secondary Schools Athletic Association (TSSAA) to comment on its lack of minority hiring on the TSSAA staff.

Ronnie Carter reviewed the history of the TSSAA organization. He said the organization currently employs four administrative staff and six support staff. The organization is controlled by a nine member board representing the member schools. Two of the TSSAA Board members are minority individuals. Overall, the association annually deals with budget limitations which restrict hiring opportunities, along with a history of limited turnover in positions. In January of this year, the TSSAA Board took action to look at the employment of an additional staff position and indicated that the position should be filled with a minority individual.

Carter noted that 67% of TSSAA's budget is composed

of receipts from the state football playoffs and the state basketball tournaments. The receipts from both these major events are annually affected by weather. He also noted that the recent interest of middle schools in developing a more formal relationship with TSSAA had led to an affiliate relationship with middle school athletic association for those schools who are concerned with rules, liability, and the proliferation of locally sponsored middle school tournaments. This interest by Middle Schools in becoming TSSAA members is an area where the expansion of staff will likely occur.

Board member Byrd comments on the Board's overall concern that TSSAA reflect hiring practices which are the same as those expected for local schools.

Chairman Ray requested Carter to provide the Board with an update at the Board's September Board meeting as to the progress being made by TSSAA in resolving this issue.

Board member Beasley asked about the current activities of middle schools. She expressed her concern that middle school programs should be devoted to the participation of all students in intramurals and less concerned with competitive athletics.

The Board adjourned and then reconvened in a meeting of the Board of Directors for the Tennessee Volunteer Public Education Trust Fund Foundation.

* * * *

MINUTES
STATE BOARD OF EDUCATION
SEPTEMBER 29, 1994

MEETING CALLED TO ORDER:

The State Board of Education met in the small assembly room for the city/county building in Knoxville, Tennessee on September 29, 1994.

***

VII. Other Items

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d. Remarks from TSSAA

Bob Baldridge, associate executive director for TSSAA, updated the Board on TSSAA's employment practices. He noted the association's ongoing difficulties in maintaining sufficient revenues which would allow the organization to expand its current number of staff positions such that, pending any staff turnover, minority candidates could be considered for vacant staff positions.

Hosea Hill from Memphis, Tennessee spoke about TSSAA's hiring practices. He provided the Board with a number of documents and discussed the history of the questions raised with regard to the employment of minority individuals by TSSAA.

Bob Byrd, SBE member, indicated his ongoing concern that TSSAA rectify this situation. He noted the assurances provided to the Board at both this and the July meeting that the problem would be resolved within the next year or two as sufficient funding is obtained by the organization.

* * * *

MINUTES
STATE BOARD OF EDUCATION
MARCH 14, 1995

MEETING CALLED TO ORDER

The State Board of Education met in its offices on March 14, 1995.

III.e. TSSAA Designation

Patrick Smith, SBE staff, presented the item for information and said item should be deferred for action until the Board's April meeting.

* * * *

State Board of Education
March 14, 1995

Agenda
Other Item III.E.

Tennessee Secondary School Athletic Association Designation

The Background:

The Tennessee Secondary School Athletic Association (TSSAA) is a not for profit corporation whose purpose is "to stimulate and regulate the athletic relations of the secondary schools in Tennessee." State Board of Education rules designate the TSSAA as the authority to supervise interscholastic athletics among public schools. Current board rules also call for annual approval of the rules and regulations in the official TSSAA handbook.

The Proposal:

Due to the nature of the relationship between the TSSAA, a private entity, and the State Board of Education, changes are proposed in the language of the Board's rules on interscholastic athletics. Some confusion has arisen regarding characterizing TSSAA's internal rules as rules promulgated by the State Board of Education under its statutory authority.

The Recommendation:

The SBE staff recommends adoption of the proposed rule.

Proposed Revision: March 14, 1995

PROPOSED RULE REVISION:

Rule 0520-1-2-.08 is amended by deleting it in its entirety and replacing it with the following rule:

The State Board of Education recognizes the value of participation in interscholastic athletics and the role of the Tennessee Secondary School Athletic Association in coordinating interscholastic athletic competition. The State Board of Education authorizes the public schools of the state to voluntarily maintain membership in the Tennessee Secondary School Athletic Association.

MINUTES
STATE BOARD OF EDUCATION
APRIL 19, 1995

The State Board of Education met in its offices on April 19, 1995.

***

IV. E. TSSAA Designation

Patrick Smith, SBA staff attorney, presented the recommendation for a rule revision to clarify the Board's relationship with the Tennessee Secondary Schools Athletic Association (TSSAA).

Minnie Bommer, SBE member, asked if TSSAA membership is voluntary.

Brent Poulton, SBE executive director, said the current rule implies that the Board can change TSSAA rules when in fact the Board does not have that authority. The recommended revision would reflect the reality of the Board's authority regarding the operations of TSSAA.

Smith said in recent court decisions the state does carry liability and that this revision would make clear the relationship of the Board to TSSAA.

Bommer asked if the Board needs to work further to define its relationship with TSSAA.

Poulton said the Board's relationship to TSSAA would be reviewed by Board staff during the coming year.

ACTION: Bob Byrd moved approval of the rule revision. Fielding Rolston seconded. Roll call vote. Motion passed with one no and one abstention.

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State Board of Education **Agenda**
April 19, 1995 **Other Item IV.E.**

Tennessee Secondary School Athletic Association Designation

The Background:

The Tennessee Secondary School Athletic Association (TSSAA) is a not for profit corporation whose purpose is "to stimulate and regulate the athletic relations of the secondary schools in Tennessee." State Board of Education rules designate the TSSAA as the authority to supervise interscholastic athletics among public schools. Current board rules also call for annual approval of the rules and regulations in the official TSSAA handbook.

The Proposal:

Due to the nature of the relationship between the TSSAA, a private entity, and the State Board of Education, changes are proposed in the language of the Board's rules on interscholastic athletics. Some confusion has arisen regarding characterizing TSSAA's internal rules as rules promulgated by the State Board of Education under its statutory authority.

The Recommendation:

The SBE staff recommends adoption of the proposed rule.

Proposed Revision: April 19, 1995

RULE REVISION:

Rule 0520-1-2-.08 is amended by deleting it in its entirety and replacing it with the following rule:

> The State Board of Education recognizes the value of participation in interscholastic athletics and the role of the Tennessee Secondary School Athletic Association in coordinating interscholastic athletic competition. The State Board of Education authorizes the public schools of the state to voluntarily maintain membership in the Tennessee Secondary School Athletic Association.

TENNESSEE SECONDARY SCHOOL
[TSSAA LOGO] ATHLETIC ASSOCIATION

P.O.Box 319•3333 Lebanon Road•Hermitage, Tennessee 37076
615/889-6740 Fax 615/889-0544

March 18, 1991

Mr. Eddie Krenson, Principal
Father Ryan High School
2300 Elliston Place
Nashville, Tennessee 37203

Dear Eddie:

This is in regard to the situation involving Jim Wood and three students from John Trotwood Moore Middle School that he brought to a basketball game at Father Ryan High School. After reviewing all of the information in the report from Mr. Steve Williams, athletic director, and information received from Mr. Jim Wood, I find there has been no violation of TSSAA rules.

I want to, again, commend both you and Steve for all that you have done and are doing in this area. It is very apparent, from what took place, that the coaches at Father Ryan High School are very well aware of the rules.

If you have any questions regarding this, please feel free to contact me.

Sincerely,

/s/ Ronnie Carter
Ronnie Carter

RC: afg
cc: Mr. Steve Williams

TENNESSEE SECONDARY SCHOOL
[TSSAA LOGO] ATHLETIC ASSOCIATION

P.O.Box 319•3333 Lebanon Road•Hermitage, Tennessee 37076
615/889-6740 Fax 615/889-0544

April 29, 1992

Mr. Bill Brown, Headmaster
Brentwood Academy
219 Granny White Pike
Brentwood, TN 37027

Dear Bill:

This is in regard to a recent letter which I have received from the administration of Harpeth High School. The letter indicates that one of their staff members was at a little league baseball game where a parent informed him they had received two telephone calls from Carlton Flatt concerning their son who is a 5th grade student at Kingston Springs Elementary School. According to the information given to the individual staff member, Coach Flatt had stated to the parents that their son's Jr. Pro coach had recommended him as a football player. The parents were very flattered, particularly because they had made no contact with Brentwood Academy prior to the two telephone calls. In a telephone conversation with Coach Flatt, he related to me that he had called because the name was given to him by a former player at Brentwood Academy. Mr. Flatt stated that he told the parents they had been recommended as a family that would be the kind in which Brentwood Academy would be interested and he would like to sit down and tell them about Brentwood

Academy.

Let me first make certain that we all understand -- this is not a violation of TSSAA rules. As I am sure you are aware, TSSAA rules state that these type calls cannot be made at the 7th grade level or above.

It is, however, a symptom of a much greater problem. The spirit and intent of the rules are very definitely violated, in my opinion. The obvious indication to the parents is that the call would not have been made if the student were not a football player. Again, we make football bigger than life. We aren't looking for solutions -- we are part of the problem.

In addition, there are also many other dominoes that get kicked. If it is not against the rules for Carlton to call a 5th grade student who is a good football players then it is certainly not against the rules for Bill Cox at Harpeth High School or Kurt Page at BGA or Tommy Owen at MBA to call the same student or family any number of times. Now, look at the bigger picture for just a little bit. We are talking about an individual who is 11 years old who, I would hope, is just trying to be a good 5th grade student; and his parents are now receiving telephone calls from one of the top football coaches in the history of athletics in our state.

The other domino that is kicked is the effect that it has on relationships between Brentwood Academy and other member schools of our association. Rest assured, another wedge has been driven between Brentwood Academy and Harpeth High School. I do not have to remind you that Harpeth High School has just completed their first year in the same district. I do not have to tell you what happens with an incident like this when it is relayed three or four other times to other schools. All of this is occurring at a time when the athletic program of Brentwood Academy has been placed on probation for recruiting violations and has

chosen to appeal the decision to the Board of Control. I fully respect the decision of Brentwood Academy to appeal the disciplinary action. The problem that concerns me much more is those two phases coupled with telephone calls from a coach to the parents of a student that have occurred as the result of a Jr. Pro football coach recommending a 5th grade student who is 11 years old as a football player. There has to be something sad about the message we sent. I know you hope the message is that we are interested in a family. Unfortunately, I feel the message is a Jr. Pro coach and former player at Brentwood Academy has recommended a fifth grader as a football player and the football coach at Brentwood Academy has shown an interest because football is involved. As long as that message is perceived, we will continue to have problems.

I will write a letter to Harpeth High School informing them that no violation of TSSAA rules has occurred.

Sincerely,

Ronnie Carter

RC:wmb

cc: Mr. Carlton Flatt
Mr. Gary Hines

0520-1-2-.08 Interscholastic Athletics.

(6) The State Board of Education recognizes and designates the Tennessee Secondary School Athletic Association as the organization to supervise and regulate the athletic activities in which the public junior and senior high schools of Tennessee participate on an interscholastic basis. Junior high schools must include grade nine in order to qualify for membership. The authority granted herein shall remain in effect until revoked.

(7) The State Board of Education shall annually approve the current rules and regulations as stated in the Official Handbook of the Tennessee Secondary School athletic Association.

Statutory Authority T.C.A. 49-1 -302. Filed March 16, 1992; effective June 29, 1992.

July 6, 1995

WARRIOR!

I would like to take this opportunity to **WELCOME** you to the 1995 Riverdale Warrior football team.

We are looking forward to the upcoming season with great enthusiasm and high expectations. Our opening game with Smyrna is a little over eight weeks away and we must be totally committed to the task ahead of us.

The Riverdale High School motto is "A COMMITMENT TO EXCELLENCE" and that is what we will strive for this season. With your commitment and dedication we will achieve our goal of being the "1995 REGION 4AAAAA CHAMPIONS" – on the way to "STATE CHAMPIONS".

On Monday, July 24th, Dr. O. Tom Johns and staff will physicals, free of charge, from 5:00 p.m. to 8:00 p.m. at Riverdale. Please complete the enclosed form and bring it with you on the day of the physicals. Report directly to the Riverdale High School football locker room.

ALL players will report to practice on Tuesday, July 25, 1995 at 4:00-8:00 p.m.

SEE YOU SOON!

Coach Gary Rankin

1. **Monday, July 24, 1995 physicals 5:00 p.m. – 8:00 p.m.**

BRENTWOOD ACADEMY
219 Granny White Pike Brentwood, Tennessee 37027
(615) 377-3632 fax: (615) 377-3709

Athletic Director: Carlton Flatt Asst. Athletic Director: Buddy Alexander

April 23, 1997

Having officially enrolled at Brentwood Academy, the TSSAA allows you to participate in spring football practice. If you are not currently involved in a sport at your school, we would like to invite you to practice with your new team. Equipment will be given out April 30th at 3:30 downstairs In the locker room.

Spring practice will begin May 1, 1997 and conclude on May 14, 1997. Practice begins at 3:20 and will be finished by 4:45. Due to the inconvenience to your parents, please do not feel that you must attend every practice. However, I do feel that getting involved as soon as possible would definitely be to your advantage.

In the near future, you will receive a letter outlining our summer workout program. If you have any questions, please call me at school 373-0611 x 119, or at home 373-0475. We are certainly glad that you decided to become an ***Eagle***.

Your Coach,

Carlton Flatt

[LOGO] Brentwood Academy

219 Granny White Pike
Brentwood, TN 37027
Phone (615) 373-0611
Fax (615) 377-3709

Date: 5/29/97

TO: Ronnie Carter

Fax #: 615-889-0544

From: Carlton Flatt

# of pages including cover: 3

Message: Concerning information per our conversation.

Sent to Ronnie Carter 5/29/97 in response to questions received by Coach Flatt over the phone

1. Flatt's connection with:
   A. Bart King
   - through AAU basketball, lives in Brentwood
   - allowed AAU to use our gym with his girls and boys teams

   B. John Patton
   - father of Mickie, a current sophomore student
   - coached Brentwood Academy's middle school boys basketball team with Mickey Jacobs, another Brentwood Academy father
   - uses our gym for AAU basketball team which includes several of our players

   C. Kevin Armstrong
   - never heard of him until fall of '96 when he called me to tell him about two students at Neely's Bend who would benefit from Brentwood Academy
   - I told him that the parents of these students should contact Mrs. Brasher, Director of Admission, if interested.

2. When did Flatt meet?

Glean Eddy and Jesse Kellogg applied for admission to Brentwood Academy, went through the admission process and were accepted for the 1997-98 school year. As a member of the Admission Committee, I met these two students when they were
interviewed.

Jacques Currey—I met him at AAU practice on the Brentwood Academy campus

- went through the admission process and was accepted for the 1996–97 school year—did not matriculate.

- reapplied, went through the admission process and was accepted for the 1997–98 school year

Jermonde Davis

- went through the admission process and was accepted for the 1996–97 school year—did not matriculate
- reapplied, went through the admission process and was accepted for the 1997–98 school year.

George King—Our records show that he called to make an appointment with Nancy Brasher but did not show up.

Jarvis Currey and Drew Wells—I do not know them.

Altony Williams—I have not met him.

- He applied to Brentwood Academy but was not accepted for admission for the 1997–98 school year

3. Students who have applied to Brentwood Academy:
Neely's Bend—Glean Eddy, Jesse Kellogg
East—Jaques Currey, Altony Williams
Cameron—Jermonde Davis, Antoine Owens, Adrian Davis
Goodlettesville—no applicants

4. Kevin Armstrong called me about attending one of our games and a possible gate where coaches could get in free. I told him I would leave two tickets at the ticket both in his name but that they could not be used by any student. I was unaware that he and Glean Eddy attended a game until Mary Marshall, Glean's mother, called me and told me that the coaches at Hunter's Lane were upset about Kevin taking him to one of our games. She also told me that Coach Pigue at Hunter's Lane had made statements to Glean's brother who attends or attended Hunter's Lane that we were trying to recruit Glean. I called Coach Pigue to assure him that I had nothing to do with Glean coming to our game

and that if there were any problems I would come over there and discuss the situation. Coach Pigue told me that there was not a problem and that Mrs. Eddy was just shopping her son.

5. Students who participated in Brentwood Academy's spring practice include:
Drew Allan—Brentwood Middle
Jermonde Davis—Cameron
Glean Eddy—Neely's Bend
Chandler Garrick—Ensworth
Jesse Kellogg—Neely's Bend
Josh King—Mt. Juliet
Ray Marley—Grassland Middle
Brett McCord—Wright Middle
Graham Nelson—Brentwood Middle
Jake Slaughter—Woodland Middle
Chris Smithson—Woodland Middle
Zach Winter—David Lipscomb

I have neither contacted nor asked anyone, in particular Bart King and John Patton, to contact the above-listed students about attending Brentwood Academy. If you would like to speak with Bart King or John Patton they can be reached at the following numbers: Bart King 366-6565 W; John Patton 862-7572 W.

/s/ Carlton Flatt
Carlton Flatt
Athletic Director

JA-124

TENNESSEE SECONDARY SCHOOL
[TSSAA LOGO] ATHLETIC ASSOCIATION

P. O. BOX 319 • 3333 LEBANON ROAD •
HERMITAGE, TENNESSEE 37076
615/889-6740
FAX 615/889-0544

MEMORANDUM

Date: May 30, 1997

TO: Bill Brown, Headmaster

FROM: Ronnie Carter, Executive Director

Please respond to the following questions:

1. Give us policy of admitting any coaches and any athletes (middle school, junior pro, etc.) to any contests? Has this been done in the last three years in any sport for anyone other than Kevin Armstrong?

2. In regard to spring practice, are students from schools other than Brentwood Academy permitted to attend spring practice in boys' basketball or girls' basketball? Please give following information:

Number attending spring practice not in your building. Please give names and schools.

	1997	1996	1995
Football	12 (names and schools already provided)		
Boys' Basketball			
Girls' Basketball			

3. Since the students cannot drive, how do they get to Brentwood Academy and how do they get home?

4. Some students are attending spring practice while enrolled in another TSSAA member school while other students are not permitted to attend practices. How do you make this determination? Can anyone (accepted or not accepted, etc.) go through spring practice?

5. The information received from Coach Flatt indicates Jacques Curry and Jermonde Davis have gone through the admission process and have been accepted. Please indicate how the $300 fee was paid in each case.

6. Please inform us of the following: Since Mr. Patton is a Brentwood Academy coach, what students (names and grades) are on his AAU team? Please give practice dates and games that have been played by his AAU team.

7. Coach Flatt has indicated meeting students at AAU practice. Please give number of times any other coaches from Brentwood Academy have been present at AAU practices. Please list individually.

8. What is Brentwood Academy's policy in regard to use of facilities? Who else uses facilities? How many years have AAU teams used facilities? Please give teams, coaches, and

age groups for last three years. Is there a fee charged? Who provides insurance? If not Brentwood Academy, do you have a copy of the certificate of insurance provided by this group or other groups on file?

9. Coach Flatt states that he has neither contacted or asked anyone to contact the students provided on a list to him. Please help us clarify.

a) Have any letters, notes, etc. been written to students or parents by Coach Flatt or any other coach?

b) Have there been any personal conversations prior to spring practice with students or parents?

c) Has Coach Flatt called any of the students or parents? Please provide any information.

On a separate sheet of paper, please have Coach Robert Butler respond to the following:

1. His knowledge of, relationship with, and connection with Bart King, John Patton, and/or Kevin Armstrong.

2. Has he had any contact with (please give details) or had any discussions (please give details) with either the students listed below or any other person concerning them:

a) Glean Eddy
b) Jesse Kellogg
c) Jacques Currey
d) Jermonde Davis
e) George King
f) Jarvis Currey
g) Dewayne Wells
h) Altony Williams

If you have any questions regarding any of the above, please feel free to contact me.

RC

wmb

Received
June 13, 1997
T.S.S.A.

[BA LOGO]
BRENTWOOD ACADEMY

219 Granny White Pike
Brentwood, Tennessee 37027
615-373-0611 FAX: 615-377-3709
E Mail: Office@brentwoodacademy.com

William B. Brown, Jr.
Headmaster

To: Ronnie Carter, Executive Director
From: Bill Brown, Headmaster

1. Give us policy of admitting any coaches and any athletes (middle school, junior pro, etc.) to any contests? Has this been done in the last three years in any sport for anyone other than Kevin Armstrong?

1. Any coach, at any level, has been admitted free upon request to the Athletic Director for the last 26 years. (not including playoff or tournament games) This policy also includes any school personnel (teachers; principals). Coach Flatt has not called any coach and offered free admission during the last three years. Any student not attending BA (athlete or not) above the sixth grade is not admitted free to football or basketball games.

2. In regard to spring practice, are students from schools other than Brentwood Academy permitted to attend spring practice in boys' basketball or girls' basketball? Please give the following information:
Number attending spring practice not in your building. Please give names and schools.

2. a). Brentwood Academy does not have Spring Practice in girls' & boys' basketball. In June all new students are given the opportunity to practice.

b). 1996 - Justin Uselton - Harpeth Jr. High

1995 - Do not recall any

Since we received complaints last year about some students not being aware of spring practice, we decided to send a letter to ALL new male 9th-12th grade students informing them of this event. This is the reason there were so many this year. Typically, we have 8 to 12 new 9th-12th grade students participating in high school football at the beginning of fall practice.

3. Since the students cannot drive, how do they get to Brentwood Academy and how do they get home?

3. We in no way address this issue. We state that if it is a hardship or if *they* are involved in anything at their school, they should not attend.

4. Some students are attending spring practice while enrolled in another TSSAA member school while other students are not permitted to attend practices. How do you make this determination? Can anyone (accepted or not accepted etc.) go through spring practice?

4. Coach Flatt called Ronnie Carter the last three years about new students participating in Spring Practice and to make certain the policy had not changed. Ronnie gave him permission as long as they were accepted in admission and we had the written indication from them that they planned to attend Brentwood Academy. Ronnie also gave him permission for these students to lift weights at Brentwood Academy. This year there was an unusually high number of new students participating in Spring Practice. This is the first time that we have sent a letter to all new upper school boys. We sent this letter because in the past if a new parent called concerning Spring Practice, we gave them the information, and other new students felt left out. In our efforts to include all new students and not to run the risk of being accused of selecting only certain

students, we implemented this procedure. Coach Flatt followed the guidelines given to him by Ronnie Carter exactly. He certainly realizes that such a visible event would be under heavy scrutiny.

5. The information received from Coach Flatt indicates Jacques Curry and Jermonde Davis have gone through the admission process *and have been accepted. Please indicate how the $300 fee was paid in each case.*

5. The $300 for Jacques Curry has not been paid because he is a candidate for financial aid. The Spring Practice letter was not sent to Jacques Curry because his documentation that he would be attending Brentwood Academy had not been received at that time. The $300 for Jermonde Davis was paid on March 5, 1997 by a money order.

6. Please inform us of the following: Since Mr. Patton is a Brentwood Academy coach, what students (names and grades) are on his AAU team? Please give practice dates and games that have been played by his AAU team.

6. Mr. Patton's son, Mikie, was an eighth grader two years ago when our head coach, Marcus Bodie, asked him to assist him free of charge. Last year Marcus left to coach at Franklin High School. Mr. Patton asked to be considered as our paid eighth grade coach. After discussion with Coach Holman, I decided to hire him. He asked Mickey Jacobs to assist him since Mickey's son, Mikael, was on the team. I had a meeting with Mr. Patton in my office to review TSSAA rules just like I do any coach. See attached information from Mr. Patton.

7. Coach Flatt has indicated meeting students at AAU practice. Please give number of times any other coaches from Brentwood Academy have been present at AAU practices. Please list individually.

7. Coach Flatt is responsible for the use of athletic facilities and periodically checks on the condition of the

facilities. We provide our facilities to many AAU and other various leagues. Coach Flatt's daughter plays on a team that practices and plays in our gym. Perhaps 10 times he has been present at AAU practices. Robert Butler coaches 3 teams, 2 AAU teams and a church league team. Brad Perry coaches one AAU team. He is unaware of other coaches being present.

8. What is Brentwood Academy's policy in regard to use of facilities? Who else uses facilities? How many years have AAU teams used facilities? Please give teams, coaches and age groups for last three years. Is there a fee charged? Who provides insurance? If not Brentwood Academy, do you have a copy of the certificate of insurance provided by this group or other groups on file?

8. a). Buddy Alexander, Assistant to the Athletic Director, takes calls concerning athletic facility use. Usually, if there is a connection between a coach or player and our school or someone in the community, we try to accommodate the request. We have many groups who use the track, softball, baseball and basketball facilities year-round. There is no fee charged unless the use generates revenues. Brentwood Academy maintains adequate liability insurance to cover the exposure created by these uses. We ask the groups to sign a standard waiver, release, and covenant not to sue and provide a certificate of insurance.

b). <u>1996-97 Gymnasium Use</u>

1. Brentwood YMCA Basketball League Coach Jeff Gillis, 12 & under	Saturdays, Dec.-Feb.
2. Dr. Greg Sikes Junior Pro	1 time/wk, Jan-Feb
3. Carter Brown Junior Pro	1 time/wk, Jan-Feb
4. Bart King, Benny Proffitt AAU, Boys 14 & under	5 practices between last summer and fall

5.	Bart King Junior Pro, 12 yr old boy	practice 2 times/wk through the fall
6.	John Patton AAU, Boys 15 & under	practice 2 times/wk March-May
7.	Brad Perry AAU, Boys 13 & under	practice 2 times/wk March-May
8.	Robert Butler AAU Girls 10 & under AAU Boys 12 & under	practice 2 times/wk April-June
9.	Scott Reall Junior Pro All-star, Boys 12 & under	4 practices in April
10.	Bart King, Robert Butler 6th grade girls, First Pres. League	1 practice/week Nov.-Dec.

Football Field

1.	Carter Brown 5/6th grade team, Southwest YMCA	3-4 practices/wk Sept.-Oct.

[Attachment]

To: Ronnie Carter
From: Robert Butler

1. His knowledge of, relationship with, and connection with Bart King, John Patton, and/or Kevin Armstrong.

1. Bart King: I first knew of him through phone conversations we had when he was chairman of the Brentwood Rotary Girls Basketball Tournament.

John Patton: A family acquaintance for about 5 years and know him as a fellow coach at Brentwood Academy.

Kevin Armstrong: never heard of him.

2. Has he had any contact with (please give details) or had any discussions (please give details) with either the students listed below or any other person concerning them:

2. *a).Glean Eddy*
met at Spring Practice

b).Jesse Kellogg
met at Spring Practice

c).Jacques Curry
met him when he interviewed at B.A. Tried out for travel team at B.A. and said hello.

d).Jermonde Davis
no contact

e).George King
never heard of him

f). Jarvis Currey

g).Dewayne Wells
never heard of him

h).Altony Williams
never heard of him

* * *

TENNESSEE SECONDARY SCHOOL
ATHLETIC ASSOCIATION

[TSSAA LOGO]

CONSTITUTION

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION

ARTICLE I

Name and Purpose

Section 1. The name of the corporation shall be the Tennessee Secondary School Athletic Association, and hereafter shall be referred to as TSSAA.

Section 2. The purposes of the corporation shall be as stated in the Charter of Incorporation and, in addition, to stimulate and regulate the athletic relations of the secondary schools in Tennessee.

Recognizing that the primary objective of all secondary schools is to educate youth, the TSSAA aims to co-ordinate the athletic and scholastic programs. The athletic field and the gymnasium are classrooms in which teaching is foremost in the development of character, integrity, sportsmanship, and teamwork. Although the athletic program is associated primarily with physical education and the scholastic program with mental education, one complements the other.

* * *

ARTICLE III

Board of Control

Section 1. Administration: The administrative authority of the TSSAA shall be vested in a Board of Control composed of nine members. This Board of Control shall be composed of one representative from each Athletic District, who shall be elected to serve for a period of three years. The terms of office of three of the members of the Board of Control, one from each Grand Division of the state, shall expire each year.

Section 2. Elections: The election of members of the Board of Control shall take place in an annual meeting of the schools of each Grand Division. Nominations shall come from within the district of the member whose term is expiring, and only the members of that Athletic District may vote for their representative on the Board of Control. Each member school of the Athletic District that is represented at the meeting by the principal, or other faculty member, shall be entitled to one vote. In the event of a tie vote, the tie will be broken by a vote of the schools in that Grand Division of the state attending the regional meeting.

The term of office for members of the Board of Control shall begin at the March meeting following their election.

All members of the Board of Control must be principals or superintendents. (An assistant principal who devotes full time to administrative duties shall be eligible to serve.) County superintendents shall not be eligible for membership, nor shall city superintendents of systems of more than one four-year high school or senior high school be eligible for membership. A principal or superintendent cannot serve as a member of the Board of Control and as a member of the Legislative Council at the same time.

Section 3. Officers: The officers of the Board of Control shall be a president and a vice president. These officers shall be elected annually by the members of the Board of Control and each shall perform the duties usually required of the office. The President and Vice-President of the Board of Control shall serve as President and Vice-President of the TSSAA. The President of the Board of Control shall also attend all meetings of the Legislative Council. The Executive Director shall act as Secretary of the Board of Control.

Section 4. Vacancies: Withdrawal from the teaching profession, suspension or lapse of membership of the school represented, or removal from the Athletic District represented shall immediately terminate membership on the Board of Control, and the vacancy shall be filled as provided below.

Vacancies on the Board of Control shall be filled by the members of the Board of Control representing the Grand Division wherein the vacancy occurs. Such members shall serve until the next annual meeting of the member schools of the Grand Division, at which time vacancies shall be filled by regular election.

Section 5. Power and Duties of Board of Control: The Board of Control shall:

(a) Have general control over all athletic contests in which member schools participate.

(b) Elect an Executive Director and delegate to him the authority to interpret and to enforce the Constitution and Bylaws of the TSSAA.

(c) Provide office facilities and employees for properly

conducting the business of the Association. (The Tennessee Secondary School Athletic Association is an Equal Opportunity Employer.)

(d) Determine and authorize all necessary expenditures of money in the conduct of the affairs of the Association.

(e) Determine methods of, and qualifications for, registration of officials; revoke registration of any official for just cause.

(f) Act as a final court of appeals.

(g) Have authority to rule on any cause not covered by the Constitution and Bylaws, until the Legislative Council adopts a rule covering the situation.

Section 6. Meetings: The Board of Control shall meet in August, November, January, March and June. Other meetings may be called by the President of the Board of Control.

Section 7. Quorum: A majority of the members of the Board of Control shall constitute a quorum for the transaction of business.

* * *

Article IV

Legislative Council

Section 1. Legislative Body: The legislative body of the TSSAA shall be a Legislative Council composed of nine members. Members shall consist of one representative from each Athletic District elected to serve for a period of three years. The terms of office of three of the members of the

Legislative Council, one from each Grand Division of the state, shall expire each year.

Section 2. Election: The election of members of the Legislative Council shall take place in an annual meeting of the schools of each Grand Division.

Nominations shall come from within the district of the member whose term is expiring, and only the members of that Athletic District may vote for their representative on the Legislative Council. Each member school of the Athletic District that is represented at the meeting by the principal, or other faculty member, shall be entitled to one vote. In the event of a tie vote the tie will be broken by a vote of the schools in that Grand Division of the state attending the regional meetings.

The term of office for members of the Legislative Council shall begin at the March meeting following their election.

All members of the Legislative Council must be principals or superintendents. (An assistant principal who devotes full time to administrative duties shall be eligible to serve.) County superintendents shall not be eligible for membership nor shall city superintendents of systems of more than one four-year high school or senior high school be eligible for membership. A principal or superintendent cannot serve as a member of the Legislative Council and as a member of the Board of Control at the same time.

Section 3. Officers: The officers of the Legislative Council shall be a president and a vice president. These officers shall be elected annually by the members of the Legislative Council and each shall perform the duties usually required of the office. The President of the Legislative Council shall also attend all meetings of the

Board of Control. The Executive Director shall act as Secretary of the Legislative Council.

Section 4. Vacancies: Withdrawal from the teaching profession, suspension or lapse of membership of the school represented, or removal from the Athletic District represented shall immediately terminate membership on the Legislative Council, and the vacancy shall be filled as provided below.

Vacancies on the Legislative Council shall be filled by the members of the Legislative Council representing the Grand Division wherein the vacancy occurs. Such members shall serve until the next annual meeting of the member schools of the Grand Division, at which time vacancies shall be filled by regular election.

Section 5. Duties: The Legislative Council shall make necessary amendments to the Constitution and Bylaws and act upon suggestions submitted by 25 members of the Association.

Section 6. Meetings: The Legislative Council shall meet in December during the week of the state football championships and in March during the week of the state basketball tournaments. Other meetings may be called by the President of the Legislative Council.

Section 7. Quorum: A majority of the members of the Legislative Council shall constitute a quorum for the transaction of business.

* * *

Article V

Executive Director

Section 1. The Executive Director shall be elected for a term of three years by the Board of Control.

Section 2. Under the direction of the Board of Control, the Executive Director shall receive, hold, expand and account for all funds of the Association.

Section 3. He shall maintain the records and property of the Association.

Section 4. He shall initiate investigations, conduct hearings, collect information, render decisions and fix penalties based on the evidence, and in accordance with the rules and regulations of the TSSAA. Such decisions shall be subject to review by the Board of Control on appeal by the principal of the member school involved.

Section 5. He shall attend all meetings and serve as Secretary of the Board of Control and of the Legislative Council.

Section 6. He shall be an ex-officio member of all committees of the Board of Control and of the Legislative Council.

Section 7. He shall administer the rules and regulations governing the certification of officials as directed by the Board of Control.

* * *

Article VI

Hearings

Section 1. Any school charged with violating TSSAA regulations shall be notified of such charges by the Executive Director. If a hearing is desired by the school involved, the Executive Director must be notified immediately in writing. Provisions will then be made for such hearing, and the school so notified.

Section 2. A member school shall not be suspended from membership without first being given the opportunity to present its case at a hearing. Hearings shall be conducted by the Executive Director in the presence of two or more members of the TSSAA Board of Control who represent the Grand Division of the state in which the school is located, and who shall act in an advisory capacity. After testimony has been heard, the Executive Director shall meet in executive session with the members of the Board of Control who are present at the hearing. After discussing with the Board members the evidence and possible penalties, the Executive Director shall decide what penalty, if any, is to be placed against the school.

Section 3. Any decision of the Executive Director may be appealed to the Board of Control. If the decision of the Executive Director is sustained, the school making the appeal shall defray the expenses for the meeting of the Board of Control in case a special meeting of the Board is called to consider the appeal.

Section 4. No member of the Board of Control shall serve on the Board while a case involving the school which he represents is being heard.

* * *

CONSTITUTION FAQ

1.

Q. How are members of the Board of Control and Legislative Council selected?

A. Members of the Board of Control and of the Legislative Council are selected at the annual regional meetings in the fall. Each school represented has one vote. The East Tennessee meeting is held in Knoxville, Middle Tennessee in Nashville, and West Tennessee in Jackson.

2.

Q. How may a school charged with violating TSSAA regulations present its case?

A. The principal of the school may request the Executive Director to call a hearing in regard to the charges. Such a hearing is held before the Executive Director and two or more Board of Control members representing the Grand Division of the state in which the school is located.

3.

Q. May a decision made by the Executive Director be appealed to the Board of Control?

A. Yes.

4.

Q. What procedure is followed by a school that wishes to appeal to the Board of Control a decision of the Executive Director?

A. The school principal should notify the Executive Director in writing that the principal wants the Board of Control to review the case. If it is satisfactory to hold the review of the case at the next regular meeting of the Board of Control, it will be listed on the agenda. If the case is of such nature that the school wants immediate action, the principal should so indicate. The Executive Director will then communicate with the president of the Board who will call a special session to consider the case. When such a special session of the Board is called, the school requesting the special session shall pay all expenses of the meeting in the event the Board of Control sustains the decisions of the Executive Director.

5.

Q. Does the Executive Director have a vote on matters that are presented to the Board of Control?

A. No. The Executive Director is not a member of the Board of Control and therefore can have no vote on matters being considered by it.

6.

Q. May a member of the Board vote on a matter involving the school which he represents?

A. No. A member of the Board of Control cannot sit in on a case involving his or her own school.

7.

Q. How may a member school submit a proposal to amend the Constitution or to change the Bylaws?

A. By putting the suggested change in writing and filing it with the Executive Director no later than October 15 preceding the December meeting of the Legislative Council.

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TENNESSEE SECONDARY SCHOOL
ATHLETIC ASSOCIATION

[TSSAA LOGO]

BYLAWS

ARTICLE I

- Membership
- Financial Statement
- Suspension
- Sponsored Sports
- Cooperative Programs

Membership

Section 1. Secondary schools (also junior high schools) in the state, which are approved by the State Department of Education, State Department of Education approved agencies (Schools must be in category 1, 2, or 3.) and/or the Southern Association of Colleges and Schools, both private and public, desiring membership in TSSAA may make application to the Board of Control. Applications for membership shall be approved or rejected by the Board of Control.

Member schools that withdraw from the TSSAA membership must be an affiliate member for one year upon application to renew membership.

Section 2. There shall be two divisions for athletic competition — the Senior High Division and the Junior High Division. For tournament competition in the Senior High Division, there shall be two categories. Division I shall be

schools whose student-athletes do not receive need-based financial aid. Division II shall be those schools whose student-athletes may be the recipients of need-based financial aid.

Schools which include grades 7-12, 8-12, 9-12 and 10-12 may compete in the Senior High Division. Schools in transition, if they desire, may compete in the Senior High Division after the 10th grade has been added.

Schools which include grades 7, 8 and 9, grades 8 and 9, or grade 9 may compete in the Junior High Division. (It will, therefore, be possible for some schools to compete in both the Senior and the Junior High Divisions, while other schools will be able to compete in only one of the divisions. Even though the school may participate in both divisions, it will hold only one membership in TSSAA.)

Schools with grades 7, 8, 9, grades 8 and 9, or grades 9 may compete in Senior High Division against Senior High Division "B" teams in regular-season contests and "B"-team invitational tournaments provided they use eighth- and ninth-grade students only.

Section 3. The annual dues for a senior high school in Class A shall be $150.00, in Class AA $200.00, in Class AAA $250.00 and for a junior high school shall be $100.00. (All TSSAA schools will pay membership dues based on where their enrollment would place them in the Division I, three-classification plan.). The TSSAA Legislative Council may not increase membership dues unless the increase is approved by a vote of TSSAA member schools.
Membership dues shall be paid in advance and shall be for the calendar year.

Section 4. Membership expires at midnight on December 31 of each year. Schools failing to renew membership before January 1 shall be charged a penalty of $25.00. The Executive Director shall notify by registered letter the principal of any school that has not renewed

membership by January 1 and advise the principal that unless the membership fee and the penalty are filed immediately the school will be dropped from the list of member schools.

Financial Statement

Section 5. The fiscal year of the Association shall be from July 1 to June 30. At the close of the fiscal year, the Executive Director shall publish a financial statement. All surplus funds shall be used as directed by the Board of Control.

Suspension

Section 6. The Executive Director and/or the Board of Control shall have power to suspend, to fine, or otherwise penalize any member school for the violation of any of the rules of the Association or for other just cause. The period of suspension or other penalty shall be left to the discretion of the Board of Control where the penalty is not fixed.

Section 7. Any school under suspension, if it has restricted its athletic program to intramural athletics for the period of suspension, may be reinstated by the Board of Control upon application made in writing, 20 days in advance of the time it desires to be reinstated, to the Executive Director by the principal of the school and by the Board of Education under which the school operates. The Executive Director shall present the application of the suspended school to the Board of Control for its consideration. The principal and the board of education shall agree in writing that the school will abide by all rules of the Association in the future. The principal and each member of the board of education shall sign the statement.

Section 8. If a school with one or more two-year

contracts has its athletic program in any sport suspended for violation of TSSAA regulations—and the first game of the two-year contract has been played at the offending school—such school shall be required to complete the contract, or contracts, when it resumes its athletic program if the school, or schools, affected desire.

Section 9. Suspension of a member school shall free all existing contracts between that school and other member schools.

Section 10. An attempt by a member school to permit a player to participate who has been declared ineligible by TSSAA shall free all existing contracts between that school and other member schools.

Section 11. Contracts made and entered into by member schools may be cancelled by mutual agreement or by authority of the Board of Control. All contracts between two schools shall be signed by the principals contracting.

Sponsored Sports

Section 12. TSSAA shall sponsor the following sports: baseball, girls softball, basketball, cross country, football, golf, tennis, track and field, girls volleyball, girls soccer, soccer and wrestling.

Cooperative Programs

Section 13. Two schools may petition TSSAA for permission to have a cooperative program in team sports (football, girls volleyball, basketball, baseball, girls softball, girls soccer and soccer) if one of the schools does not have that program or has not had that program for the last five years. Only schools with the same grade configuration may combine to form a team and schools may co-op with only one

other school (a maximum of two schools may combine to form a team). The Executive Director of TSSAA may approve such co-op programs subject to approval by principal of schools involved, school board of the schools involved, and the TSSAA Board of Control. When a co-op program has been formed between schools it must be re-evaluated after one year and is subject to approval by the Executive Director.

A student attending the ninth grade at a junior high school which terminates at the ninth grade may participate for the senior high school for which it is the feeder school, provided: (a) both schools are under the jurisdiction of the same board of education; (b) the student resides in the zone of that high school; and (c) the student does not have the opportunity to participate in that sport at the junior high school because the junior high school does not offer that sport.

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ARTICLE II

ELIGIBILITY RULES

Academic Rules
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Eight Semester Rule
Years of Participation
Grade and Season
Participation Age Limit
B Teams and Six-Quarter Rule
Independent Game Participation
All-Star Games
Transfer Rules
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Residence Rule
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College Attendance
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Forfeitures

The member high schools of the Tennessee Secondary School Athletic Association have adopted, through their elected representatives, an essential inter-related group of minimum eligibility requirements which establish the threshold for participation for all students within the interscholastic program and which work together to define and preserve the fundamental nature of the program.

Academic Rules

Section 1. To be eligible to participate in athletic contests during any semester:

(a) The student shall have made a passing grade the preceding semester in at least five full unit subjects or their

equivalency, provided the student is in class five days a week. If a school or school system averages the first and second semester to determine credit for the entire year in a subject, the yearly grade may be used to determine eligibility for the fall semester. Preceding semester is the last semester school was in session. If a student is forced to withdraw from school, or is prevented from enrolling in school, due to illness or accident to the student, the principal may submit to the Executive Director full details concerning the illness or accident and request a ruling in regard to the student's eligibility, provided the student was eligible at the time the illness or accident forced the student to withdraw or prevent the student from enrolling in school. If ruled eligible, such a student shall be charged with a semester of attendance for athletic purposes for the semester of non-attendance or withdrawal.

A student who returns to a member school after attendance at a school of correction or alternative school may be eligible for athletic participation provided the school of correction or alternative school is accredited by the Tennessee State Department of Education and provided the student returns to the school attended before entering the school of correction.

Any student assigned by the juvenile court to Tennessee Preparatory School shall be eligible for athletic competition upon entering. After one full semester, the student must meet all eligibility standards to continue his/her eligibility.

(b) Students shall be regularly enrolled, in regular attendance, and carrying at least five full courses. A student shall be considered as regularly enrolled after the student has attended for three days, has engaged in three or more days of football, girls volleyball, cross country, golf or girls soccer practice during the period on or after August 1, or has participated in an athletic contest in any sport.

Section 2. For athletic purposes the scholastic record

filed in the office of the principal or superintendent at the end of a semester shall be final. Credits earned in a summer school accredited by the State Department of Education shall be recognized for eligibility purposes provided the student was enrolled during the spring semester immediately preceding the summer session and attended at least 40 days of that spring semester.

Section 3. A student who drops out of school before the end of the semester shall be ineligible to participate in secondary school athletics until the student has been in school a semester and has passed in at least five full unit subjects. (To become eligible under this regulation, a student must attend school for at least 40 days of the semester, but in no case shall the eligibility become effective until the beginning of the succeeding semester.)

1.

Q. Are subjects such as physical education and ROTC counted in determining the eligibility of a player?

A. Yes. Provided these subjects carry one full credit for the year or one-half credit for the semester and meet one hour each day for five days a week or the equivalent.

2.

Q. Is a student who drops out of school for one or more semesters eligible to participate when that student returns, provided he or she completes the last semester he or she was in school and passed the required number of subjects?

A. No. A student must attend school one semester before he or she becomes eligible to participate.

3.

Q. Must a student have earned five units of credit the previous year in order to be eligible?

A. No. Eligibility is based on the work being done each semester. A student must earn five units each semester. (See also question No. 10)

4.

Q. The school passing mark is 70. At the close of the first semester an athlete has a grade of 80. At the close of the second semester the grade in the same subject is 65. At the end of the school year the two grades are averaged and the student is allowed one unit of credit. May this subject be used in meeting the scholastic requirements?

A. Yes.

5.

Q. A student is forced to withdraw from school, or is prevented from enrolling in school, due to illness or accident to the student. After being out of school for a semester, or a part of a semester, the student recovers from and enters school at the beginning of the next semester. Is it possible for such a student to be eligible to participate in athletics?

A. Such a case may be considered as a special case by the Executive Director provided the principal submits details in regard to the absence of the student. If the student is ruled eligible, that student shall be charged with a semester of attendance for athletic purposes, even though he or she attended less than forty days of the semester, or did not even enroll.

6.

Q. A student has an incomplete or is conditioned at

the end of the first semester. Will the student be eligible for participation in the second semester as soon as the conditions are removed?

A. A student who receives an incomplete in a subject which causes him or her not to meet minimum scholastic requirements is ineligible until the course is satisfactorily completed. His or her eligibility is restored at that point.

7.

Q. What is meant by the term "full unit subject" as used in Article II, Section 1 (a)?

A. A subject that carries one-half unit credit for a semester or one credit for the school year.

8.

Q. At the close of the spring semester a student fails two or more subjects. May such student become eligible for athletic participation the following fall by attending summer school and making good the work in which he has failed?

A. Yes, provided the summer school is recognized by the State Department of Education.

9.

Q. A student was not in school during the spring semester. May that student attend summer school and become eligible for athletic participation the following fall by passing five subjects in summer school?

A. No. A student must have been in school the preceding semester or the last semester school was in session in order to be eligible. A summer session is counted as a continuation of the spring semester.

10.

Q. A student who passed only three subjects at the close of the spring semester enrolls in summer school and earns two units or credits in English by taking both the first and second semesters' work. Since that student will have passed two subjects will he or she be eligible for athletic participation in the fall?

A. Yes. A student shall be considered as passing five full unit subjects.

11.

Q. A student passes four subjects in the spring and takes a correspondence course during the summer and passes the correspondence course. Is this student eligible for athletic participation in the fall?

A. No. TSSAA does not recognize correspondence courses.

12.

Q. A student repeats a course for which the student has already received a passing grade or is taking a course for which the student is not receiving credit toward graduation. Will this subject count as one of the five full unit subjects passed the preceding semester for athletic eligibility?

A. No. A student may not repeat a course that he or she has already passed for athletic eligibility purposes nor may a student count a subject for which he or she is not receiving credit towards graduation for athletic eligibility purposes.

13.

Q. A student enrolls in a school and attends only two days. Is this considered enrollment?

A. No. Article II, Section 1 (b) of the Bylaws states, "A student shall be considered as regularly enrolled after that student has attended school for three days, has engaged in three or more days of football, volleyball, cross country, golf, or girls' soccer practice during the period, or has participated in an athletic contest."

14.

Q. A student attends school for twenty-five days and then drops out. During the twenty-five days of attendance: (a) he or she participated in one or more athletic contests; (b) he or she did not participate in any athletic contest?

A. (a) Student will be charged with a semester since he or she participated in an athletic contest.

(b) Student will not be charged with a semester since that student did not attend forty or more days. (See Article II, Section 5.)

15.

Q. Is there any regulation about the time a student must enroll in order to be eligible during a given semester?

A. Yes. A student must enroll on or before the twentieth day of a semester.

16.

Q. A student does not attend school during the fall semester. Thirty days before the close of the spring semester, the student enrolls and passes in five full unit courses. Will that student be eligible for athletic participation the following fall?

A. No. In order to meet the requirements of having been in school the preceding semester, a student must attend at least forty days. (See Article II, Section 3.)

17.

Q. A student who was ineligible the first semester becomes eligible the second semester. May he or she participate the weekend that marks the close of the first semester?

A. No. A student is not eligible until the opening day of the second semester.

18.

Q. A student who is eligible for the first semester becomes ineligible for the second semester. The first semester ends just before the Christmas holidays begin. Is such a student eligible to participate until the first day of the second semester?

A. Yes, the student would be eligible to represent his or her school during the holidays because he or she does not become ineligible until the fast day of the second semester.

High School Graduate

Section 4. No student shall be eligible to participate in athletics after he or she has graduated from a secondary school. (A student who takes an accelerated course shall not lose his or her eligibility even though that student earns enough units to graduate provided he or she does not participate in a graduating exercise or accept a high school diploma, and provided the student has not attended a secondary school for eight semesters after enrolling in the ninth grade.)

Eight-Semester Rule

Section 5. A student shall be ineligible to compete in any sport if he or she attended a secondary school, or schools, for eight semesters of four and one-half months each. Attendance of 40 school days of any semester shall be regarded as a "semester" under this rule. If a student participates in athletics during a period of attendance of any number of days less than 40, he or she shall be charged with a semester of attendance. Attendance in junior high school shall be taken into consideration in determining the number of semesters a student has been in school.

A student who registers for two or more ninth grade subjects after having completed one school year in the eighth grade shall be classified as a high school student for athletic purposes.

The seventh and eighth semesters shall be consecutive.

1.

Q. What is the maximum number of semesters a student can attend school and still be eligible for athletic participation in the Senior High Division?

A. After a student has attended school EIGHT SEMESTERS he or she is ineligible for further athletic participation.

2.

Q. When does the EIGHT SEMESTER count begin?

A. As soon as a student enrolls in the ninth grade. A student is considered as enrolled in the ninth grade when he or she schedules two or more ninth grade subjects after having completed one school year in the eighth grade.

3.

Q. How does the semester rule apply to teams playing in the Junior High Division?

A. A student is limited to four semesters of eligibility after entering the 8th grade. The semester count starts when the student enrolls in the 8th grade.

Years of Participation

Section 6. A student who has participated in one first-team game, or B-team game, for any length of time shall be regarded as having played one year. A student shall not play more than four years in any sport while he or she is enrolled in high school.

Grade and Season Participation

Section 7. In a school organized on the six-six plan, the eight-four plan, or the one-twelve plan, eighth-grade students may compete as members of the high school team. Any student repeating the eighth grade shall not be eligible for high school participation during the year that the student is repeating the eighth grade.

Any student repeating the seventh grade after having passed the seventh grade or repeating the eighth grade after passing the eighth grade shall not be eligible to participate in athletics during their ninth-grade year.

Such participation shall not count as one of the four seasons a student is allowed to participate after enrolling in the ninth grade, but such student will be considered as having an athletic record in so far as the transfer rule is concerned.

Students in a grammar school or junior high school which are administered under a different principal than that of the high school shall be ineligible to compete as members of the high school team except as members of an approved cooperative program as described in Article I, Section 13.

A student shall not participate in more than one

complete season in a sport in a school year.

1.

Q. A student repeats the 7th grade after having passed the 7th grade. What is the status of the student's eligibility?

A. If the student is participating with a TSSAA member school in TSSAA sanctioned sport or with a school in the TMSAA, the student will be ineligible until they have reached their next highest grade (8th grade). In addition, the student will be ineligible their 9th grade year since they have repeated the 7th grade or 8th grade after having passed the 7th or 8th grade.

2.

Q. A student fails the 8th grade and repeats the 8th grade. Would the student be ineligible their 9th grade year?

A. No, provided they meet all other eligibility requirements. Ineligibility in this situation during a student's 9th grade year applies only to students who repeat the 7th or 8th grade after having passed the 7th or 8th grade.

3.

Q. If an eighth grade student participates as a member of a senior high school team, is such participation charged against the student?

A. No. Such a student will still be entitled to four years of high school participation.

4.

Q. May a seventh grade student participate as a member of a senior high team?

A. No, a student must be enrolled in the 8th grade or higher grade before he or she can participate in the senior division.

Age Limit

Section 8. No student shall be eligible to participate in any athletic contest during any school year if he or she becomes 19 years of age on or before September 1. The age rule may be waived for the Tennessee School for the Blind when this school is competing with other schools for the blind provided such schools are permitted by their state associations to waive the age rule in competing with other schools for the blind. (Effective with the 1998-99 school year no student shall be eligible to participate in any athletic contest during any school year if he or she becomes 19 years of age on or before August 1.)

1.

Q. Is a student whose nineteenth birthday falls on September 1 ineligible for participation in the Senior High Division?

A. Yes, any student who becomes nineteen years of age on or **before** September 1 of any school year is ineligible. Beginning in 1998-99, the date will be changed to August 1 so that any student who becomes nineteen years of age on or before August 1 of a school year will be ineligible.

2.

Q. If a student becomes nineteen years of age on September 2, or any date thereafter, is that student

eligible to participate for the remainder of the school year?

A. Yes.

B Teams and Six-Quarter Rule

Section 9. The membership of a B team shall be composed of all varsity substitutes and any other players that are certified to TSSAA.

All eligibility rules will apply at the varsity level only in high and junior high school. At the junior varsity or B-team level, only the age, semester, academic and repeating rules will apply. Students in violation of any of these four rules will be ineligible to participate at any level. Students that are ineligible as a result of any other rules may participate at the B-team level in either junior high or varsity athletics.

A player shall not participate in more than six quarters of play in one day during regular-season contests. (A player who enters a game for any length of time during a quarter shall be charged with a quarter's participation.)

B teams shall comply with all other TSSAA regulations.

Independent-Game Participation

Section 10. After a student's name is listed on the school eligibility report, the student shall not participate in an independent game until the season has closed or his or her name has been removed from the eligibility report at the request of the school principal.

Any game in which players not registered with TSSAA participate – regardless of whether admission is charged – is considered **as** an independent game. Violation of this rule will render the student ineligible for 25% of the number of contests allowed in that sport by the sports calendar or for the remainder of the season in that sport,

whichever number is the least. Violation of this rule a second time in the same sport in the same season will render the student ineligible in that sport for the remainder of the season.

A student's name may be removed from the school's eligibility list upon written request of the principal. After such a request has been filed with the state office, a student may then participate as an independent without penalty. If a principal requests the state office to remove a student's name from the school's eligibility list, such student may not again be certified during the season of that sport.

1.

Q. Team A is eliminated in the district basketball tournament. **May players on Team A participate in an independent game or tournament without endangering their eligibility?**

A. The basketball season ends for any member school when the **school** is eliminated from tournament play. Students may participate as members of independent teams in any sport after the season for that sport has closed without affecting their eligibility, provided the amateur rule is not violated.

2.

Q. A golfer or tennis player wishes to participate in a club tournament during the golf or tennis season. Is this a violation of the Independent rule?

A. No, provided the golfer or tennis player participates as an individual and not as a member or representative of his or her school. The independent rule does not apply to golf and tennis.

3.

Q. May a player participate in a scrimmage, practice game or game with an independent team after being registered with TSSAA in that sport?

A. No. The student shall be ineligible immediately in the sport in which the violation occurs.

4.

Q. Is it a violation for a registered athlete in baseball or softball to practice with an independent team?

A. No, provided he or she participates in only practice situations only (batting practice, infield practice, etc.), provided no game situations are involved.

5.

Q. Is it a violation for a registered athlete in track or cross country to participate in a road race?

A. No, provided the race is longer than 3200 meters during track season or longer than three-miles during cross country season.

6.

A. The student will be ineligible for the next seven contests (25% of the number of games allowed under the sports calendar) or the remainder of the season, whichever is the least.

7.

Q. A student is registered on the girls' softball team with school A. The student then participates in an independent girls' softball game. She then returns to

school A's softball team where she plays three games. The coach of school A determines that the student has played in an independent game and reports the violation to the state office. What is the penalty?

A. School A has played an ineligible player for three games. The three games will be forfeited and disciplinary action will be taken. The student is ineligible for six games. (If a student participates in three contests as an ineligible player, the three contests will be forfeited, disciplinary action will be taken against the school, and the student will be ineligible to participate in the next six contests or for the remainder of the season, whichever is the least.)

All-Star Games

Section 11. (a) No student shall be permitted to participate in an all-star game unless it is sanctioned by the TSSAA and unless he/she has completed high school eligibility in that sport; (b) no individual player is allowed to participate in more than two sanctioned all-star contests during the school year; and (c) any student who fails to comply with the preceding requirements loses athletic eligibility for a period of time to be determined by the Board of Control. This rule reflects the present NCAA rule involving all-star games and is designed to parallel those regulations.

An all-star game is defined as any contest (where admission is charged either directly or indirectly) in which one or both teams is composed of players selected from two or more regularly constituted teams. This regulation does not apply to summer baseball and girls softball.

Any all-star game beginning after March 1, 1997, and involving TSSAA athletes must be sanctioned by the TSSAA. A filing fee of $250.00 is required for the game to

be considered for sanctioning. If the game is approved then an additional approval fee of $750.00 is required. If the request is denied, then all fees shall be refunded. This fee is required for games involving groups not affiliated with the TSSAA and only upon initial application.

No member school shall permit use of its equipment, facilities, or of its employees, directly or indirectly, in the management, coaching, officiating, supervision, or promotion of player selection of any unsanctioned all-star team or contest during the school year.

1.

Q. A civic club plans to hold an all-star basketball game. Only seniors who do not participate in spring sports will participate. Would it be a violation for a coach of a member school to coach one of the teams; for the coach and principal to permit the players to use school equipment; for a registered TSSAA official to officiate the game?

A. Yes, if a game is played during the school year officials and game officials shall have no connection whatsoever with such a contest.

2.

Q. What is the difference between an independent team and an all-star team?

A. An independent team is a team that is organized to play a schedule. An all-star team is a team composed of players from different schools who are usually assembled as a team for playing one particular game.

Transfer Rules

"Transfer student"—a student who has transferred schools due to a bona fide change of residence by his or her parents or guardians or a student who has transferred schools and has not completed all the grades of his or her former school (school from which student is transferring).

"Transfer student with an athletic record"—a transfer student who has participated in a contest (varsity, B team or junior high) in the last 12 months at a member school or a school holding membership in the state high school athletic association of another state that holds membership in the National Federation of State High School Associations.

Sections 12 - 16 apply to "transfer students with an athletic record".

Section 12. The official scholastic and athletic record of a transfer student must be attested by certificate from the principal of the former school. A transfer student shall not participate in athletics in the school to which he or she transfers until a transcript of his or her work and athletic record has been received by the principal and nis or her eligibility has been approved by the Executive Director.

Section 13. If a student enrolled in a member school or a state athletic association school holding membership in the National Federation of State High School Associations who has an athletic record the previous or current school year in football, basketball, baseball, girls softball, or track and field transfers from one school to another without a corresponding change of residence by his or her parents or guardians, the student shall be ineligible for athletic competition in these five sports for 12 months. If a student enrolled in a member school or state athletic association school holding membership in the National Federation of

State High School Associations who has an athletic record the previous or current school year in golf, tennis, wrestling, cross country, girls volleyball, girls soccer or soccer transfers from one school to another without a corresponding change in the residence of his or her parents or guardians the student shall be ineligible for 12 months in whichever sport he or she has an athletic record. After being out of athletic competition for a period of 12 months a student may become eligible at any member school provided he or she meets other eligibility requirements.

A student who attends a member private, parochial, or public school other than the school to which he or she is zoned and participates in athletics cannot transfer to another school within the territory served by these schools without losing his or her eligibility for a period of 12 months—even though there is a change of residence.

A student who attends a public school to which he or she is zoned and participates in athletics and transfers to a private, parochial, or public school other than the school to which he or she is zoned and the new school is in the territory or zone of his or her original school shall be ineligible for 12 months—even though there is a change of residence.

A student who attends a public school in a city or county which has definite school zones prescribed by the Board of Education and participates in athletics may become eligible at another city or county school if his or her parents move into that school zone. Such a student will be ineligible if he or she transfers to a private, parochial, or public school other than his or her zoned school.

If an athlete's parents move during the school year from one school district or territory into another district or territory, the athlete may transfer without loss of eligibility

to the school serving the district or territory into which his or her parents have moved: (a) at the time his or her parents change residence; (b) at the end of the next report card period; (c) at the close of the semester; (d) at the close of the school year.

If the parents or guardian of a student with an athletic record move after the athlete has been enrolled in a school for one year or longer, the athlete may continue to attend and retain his or her eligibility provided his or her parents pay the expenses incurred as a result of the student not living at home.

When a student makes a transfer due to the change of the residence of his or her parents or guardians, the student shall be ineligible until the Executive Director has reviewed his or her case and has declared him or her eligible.

If a student has been ruled eligible as a result of a change of residence by an athlete's parent(s) or guardian from residence A to residence B and a transfer of schools from a school serving residence A to a school serving residence B, and the parent(s) or guardian of the student return to residence A before the student has been enrolled in the school serving residence B for one complete year, the student will be ineligible for 12 months from their last participation date.

If an ineligible contestant competes in a contest(s) and forfeitures occur as a result of the ineligibility and the student is then ruled eligible to compete, the student will be ineligible to participate in twice the number of contests in which he/she participated as an ineligible student-athlete or he/she will be ineligible for the remainder of the season, whichever is the least.

Section 14. If a student with an athletic record the previous or current school year enters a school with higher grades, or a school with the same number of grades above the seventh grade, without having finished all the grades of his or her former school, he or she shall be ineligible for one year—except (a) that a student who has completed the eighth grade, and who is no longer eligible to participate on a junior high team because of age, may transfer to the public high school serving the district in which the student resides; (b) that a student who has completed the eighth grade may transfer to a senior high school in the system with grades 9, 10, 11 and 12, or a student who has completed the ninth grade may transfer to a senior high school in the same system with grades 10, 11 and 12 provided such transfer is approved by the board of education. (This rule shall not apply to students who transfer from junior high schools that do not hold membership in their state high school athletic associations, or TSSAA.)

Section 15. Students who change their school due to a bona fide change or establishment of bus routes by the county board of education and by the county superintendent shall not forfeit their eligibility. In cases where such a change in bus routes makes it equally convenient for a student to attend another school or the school in which he or she already has an athletic record, such student cannot transfer without losing eligibility for a period of 12 months.

Section 16. A student with an athletic record who transfers from a school where the student is under discipline shall be ineligible for 12 months or until the disciplinary charges have been removed.

1.

Q. A student who has a record of participation the previous year in baseball only transfers to a nearby

school without any change of residence on the part of the student's parents. Is that student eligible to participate in football or basketball?

A. No. Such a student is ineligible in football, basketball, baseball and track for a period of 12 months from the date of the last participation in baseball. (See Article II, Section 13 regarding eligibility in tennis, volleyball, wrestling, soccer, cross country and golf.)

2.

Q. A student transfers to a school because the student's parents have moved to the community in which the school is located. The student's scholastic and athletic records are satisfactory. May such a student be allowed to participate pending the approval of his or her transfer by the Executive Director?

A. No. All transfer students must be approved by the Executive Director before being allowed to participate.

3.

Q. If the parents of an athlete move from the district in which the athlete has been attending school, may this student remain in the school to which he or she has been going and live with someone other than his or her parents without forfeiting his or her eligibility?

A. Yes, provided he or she has been enrolled in that school for a year or longer, provided no "undue influence" has been used to cause the student to continue in the same school, and provided the parents pay the expenses incurred as a result of the student not living at home.

4.

Q. If an athlete's parents change residence after the beginning of the school year, must the athlete transfer immediately to the school serving the district into which his or her parents have moved?

A. No. The athlete may transfer to the new school without loss of eligibility at the time his or her parents move, at the end of the next grading period, at the end of the semester or at the beginning of the next school year. (If the athlete remains in his or her former school and participates in an athletic contest after his or her parents have moved, he or she cannot become eligible to participate in that sport in the second school until he or she has completed the report card period or the semester.)

5.

Q. How are the words "change of residence" to be interpreted?

A. As moving from one community to another so as to justify a change of schools. Moving across the street or a few blocks away from the former residence, or similar moves, cannot be accepted as justifying a transfer to another school.
TSSAA does not recognize "dual" residences (maintaining two homes, apartments, etc.)

6.

Q. What are guidelines that are used in determining whether a bona fide change of residence has taken place?

A. Some guidelines are, but not limited to:

1. Changing of mailing address

2. Disconnecting phone in previous residence

3. Disconnecting of utilities in previous residence

4. All furniture moved from previous residence

5. The original residence should be closed, rented, or disposed of and not used by family.

7.

Q. Is it possible for an athlete who does not live at home with his or her parents or guardians to become eligible?

A. Yes. After such a student has attended school for a full school **year**, and has lived in the community in which the school is located for a period of at least twelve months, the student's case may be submitted to the Executive Director for a ruling.

8.

Q. A student transfers schools under the following situations:

1. **From a private school where she or he participated in one or more sports to a public school in the system in which he or she resides.**

2. **From a boarding school where the student participated in one or more sports to a public**

school in the system in which he or she resides with his or her parents.

3. **From a public school where the student has been paying tuition to a public school in the system in which the student resides.**

A. In all three cases, the student is eligible provided: (1) it is the first time a transfer of this type has occurred since establishing an athletic record, (2) the participation is at the beginning of the school year following the transfer, (3) the transfer is not for athletic reasons or as a result of disciplinary action.

9.

Q. A student with an athletic record the previous year lives in Town A. His or her father gets work in Town B and decides it will be more convenient for his son or daughter to enter school in Town B since he or she can ride with him as he goes to and from work. Will such a student be eligible to participate on the school team of Town B?

A. No. There has been no change of residence.

10.

Q. An eighth grade student participates as a member of a high school or junior high school team. The next year the student transfers to another school without any change of residence on the part of his parents. Is the student eligible for athletic participation?

A. No. The student is a transfer with an athletic record the previous year. His or her parents have not changed residence. (This regulation is sometimes misinterpreted due to the statement that eighth grade

participation does not count against a student. Such participation does not count as one of the four years he or she is allowed to participate while in high school, but the student is charged with an athletic record the previous year and cannot therefore transfer to another school unless there has been a corresponding change of residence on the part of his or her parents.)

11.

Q. A student participates in basketball at school. He changes to school B without a corresponding change of residence by the parents and wants to play basketball. Is he eligible?

A. No. A student will be eligible twelve months from his or her last date of participation. Example: A student last played basketball on January 16, 1991 at school A. That student would be eligible at school B on January 17, 1992.

12.

Q. A student with an athletic record transfers from school A to school B without a corresponding change of residence of his or her parents. After three days at school B the student returns to school A. Is the student eligible to participate at school A?

A. No. The student is ineligible at all schools 12 months from his or her last participation date.

13.

Q. A student who transfers from school A to school B due to a bona fide change of residence by his or her parents is ruled eligible at school B and participates in athletics at school B. One month later the family of the student returns to the original residence where the student was attending school A. Is the student eligible

to participate in athletics?

A. No. The student is ineligible to participate in athletics for twelve months from his or her last participation date, since the parents have returned to the original residence serving school A before the student has been enrolled in school B for one year.

Foreign-Exchange Programs

Section 17. To be eligible to participate in athletic contests a foreign-exchange student must be in a foreign-exchange program which has been approved by the Council on Standards for International Educational Travel (CSIET).

1.

Q. A student from another country attends a TSSAA school and lives with someone other than his or her parents. Is the student eligible?

A. Yes, provided the student is in a Foreign Exchange program which has been approved by the Council on Standards for International Educational Travel (CSIET).

2.

Q. A student from another country comes to live with a new guardian and enrolls in a school where the guardians reside. The student is not in a Foreign Exchange program approved by the CSIET. Is the student eligible?

A. No. A student must be in a Foreign Exchange program approved by CSIET.

3.

Q. A student from another country attends a TSSAA school and is in a foreign exchange program that is not

approved by CSIET. Is the student eligible?

A. No. A student must be in a Foreign Exchange program approved by CSIET.

4.

Q. A student from another country is in a Foreign Exchange program approved by the CSIET. The student participates in athletics with a TSSAA school while living with one host parent then transfers to another school as a result of a change of host parents. Is the student eligible at the new school?

A. No. As a result of the change of guardians the student must now comply with the residence rule and transfer rule in the same manner as all other students.

Residence Rule

Section 18. To be eligible, any transfer student or student who has changed schools after having completed the highest ending grade at his/her school shall live at home with his/her parents or duly appointed guardians. They must live with their duly appointed guardian for a minimum of 12 months. Where the application of this rule works a manifest justice, the Board of Control may make an exception after student has been in school for 12 months from date of entry.

This regulation shall not apply to a boarding student at a private school nor to a student who is forced to change residence or guardianship due to the dissolution of his or her home by death, separation (provided divorce papers have been signed and processed through the courts), or divorce of parents. If a student has been living with a family for a period of 12 months, or longer, it shall be assumed for athletic purposes that the head of the family is the student's guardian.

An athlete will be eligible to participate in athletics

where the parents are divorced or separated (provided divorce papers have been signed and processed through the courts) the first time he or she changes residence from one parent to the other parent, after establishing an athletic record or practice record, provided there has been a court-ordered custody change and provided the principal of the student's former school indicates that the move was not for athletic reasons. An athlete will be eligible to participate in athletics the first time the student changes residence from a guardian other than a parent to either one or both parents, after establishing an athletic record or practice record, provided there has been a court-ordered custody change and provided the principal of the student's former school indicates in writing that the move was not for athletic reasons.

All such cases must be submitted to the Executive Director and the eligibility of the student established before he or she participates.

1.

Q. A student changes school because of the death of his or her parents or guardians. The change is necessary in order for the student to have a home. Is he or she eligible?

A. Such cases should be submitted to the Executive Director who will make a decision on the facts submitted.

2.

Q. It becomes desirable for a student to live with his or her grandparents. The change in residence causes a change of school. If the grandparents are designated as the guardians of this student will the student be eligible to participate in athletics?

A. Such a student may be ruled eligible by the Executive Director if he is convinced that the guidelines as

set forth in Article II, Section 30 have been met.

3.

Q. If an athlete with or without an athletic record lives with a guardian, or adopted parent, instead of his or her parents, is the student eligible for athletic participation?

A. He or she may be approved by the Executive Director if the student has lived with the guardian, or adopted parent, for twelve months or longer. If the athlete has lived with his or her guardian, or adopted parents, for a period of less than twelve months, he or she is ineligible unless approved by the Executive Director under the provisions of the hardship rule.

4.

Q. A student with or without an athletic record moves to live with a guardian other than a parent. Is the student eligible?

A. No. A student must live with the new guardian, if other than their parent, for 12 months or longer.

5.

Q. A student whose parents are divorced or separated (provided divorce papers have been signed and processed through the courts) participates in athletics at school A while residing with one parent. The student then transfers to school B where they are residing with the other parent. Is the student eligible to participate in athletics?

A. Yes, provided it is the first change from parent to parent since establishing an athletic record, there is a court-ordered custody change, and a letter from the principal of the student's former school indicating that the move was not

for athletic reasons.

6.

Q. A student whose parents are divorced or separated (provided divorce papers have been signed and processed through the courts) participates in athletics at school A while residing with one parent. The student then transfers to school B where they are residing with a guardian other than a parent. Is the student eligible to participate in athletics?
A. No. The student will be ineligible until he or she has lived with his or her new guardian for twelve months.

Practice Rule

Section 19. A student who engages in three or more days of practice with a school in which the student is enrolled shall be ineligible in that sport for that season if the student enrolls in another school without a corresponding change in the residence of the student's parents. A student who engages in three or more days of off-season practice with a school in which the student is enrolled shall be ineligible in that sport the following season if the student enrolls in another school without a corresponding change in the residence of the student's parents. This rule shall apply to football, girls volleyball, girls soccer, basketball, wrestling, girls softball, baseball and soccer. Refer to Article II, Section 1(b) for definition of enrollment.

Date of Enrollment

Section 20. A student shall not participate in athletics during any semester unless he or she is duly enrolled on or before the 20th school day of the semester. This rule shall not apply to transfer students who have met the attendance requirements in the school last attended.

Recruiting Rule

Section 21. The use of undue influence on a student (with or without an athletic record), the parents or guardians of a student by any person connected, or not connected, with the school to secure or to retain a student for athletic purposes shall be a violation of the recruiting rule.

1.

Q. How is undue influence interpreted in the recruiting rule?

A. A person or persons exceeding what is appropriate or normal and offering an incentive or inducement to a student with or without an athletic record.

2.

Q. What is the penalty for violation of the recruiting rule?

A. Violation of the recruiting rule shall cause the student to be ineligible at the school in violation, and a penalty shall be placed against the school.

3.

Q. Is it permissible for a coach to contact a student or his or her parents prior to his enrollment in the school?

A. No, a coach may not contact a student or his or her parents prior to his enrolment in the school. This shall apply to all students whether or not they have an athletic record.

4.

Q. What are some of the guides used in determining whether there has been undue influence used which would result in a violation of the recruiting rule?

A. Some examples are, but not limited to:

1. Providing of transportation or other inducement to any prospective student/athlete to take a qualifying examination at a school, meet with school officials, etc.

2. Discussion of financial aid based on need with any prospective student/athlete by any member of the coaching staff until the student has enrolled in school (attended 3 days of school). All financial aid questions should be referred to the principal or the person in charge of financial aid. If the person in charge of financial aid is a coach, prior approval must be granted by the Executive Director of TSSAA.

3. Any initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/athlete enrolled in any member school except where there is a definite feeder pattern.

4. Any initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/athlete in the seventh grade and above at any non-member school except where there is a definite feeder pattern involving the schools.

Public high schools may contact public feeder

schools (elementary, middle school, junior high school) where there is a definite feeder pattern. Private or parochial schools may contact private schools (elementary, middle school, junior high school) where there is a definite feeder pattern.

Private or parochial schools may not contact students enrolled at the public schools. Public schools may not contact students enrolled at the private schools.

5. Any contact between a member of the coaching staff or representative of the school and prospective student/athletes prior to, during, or after contests at elementary schools, middle schools, and junior high schools except where there is a definite pattern.

6. A member school is prohibited from giving any item with school advertisement (shirts, pennants, caps, jackets, etc.)

7. Admitting students to athletic contests free of charge where there is an admission being charged at the contest except where there is a definite feeder pattern involved with the school.

5.

Q. What is allowed by member schools in contacting prospective students?

A. A representative of the school may meet with students at a school that is defined as a feeder school or meet with students who are zoned to attend that school the following year. This visit must be cleared by the principals of both schools.

Guidelines For Understanding The "Recruiting Rule" and Understanding "What Is Undue Influence?"

1. The major theme of the "recruiting rule" is not "initial contact" The major theme is "exceeding what is normal and appropriate." Initial contact can be a violation, but is only one of many things that can exceed what is normal and appropriate.

2. One key is not treating "athletes" or "prospective athletes" any differently than students who are not athletes.

3. Students should be seen as students and not singled out based on their potential athletic ability.

4. Pre-arranged contact is seen in the same manner as initial contact.

5. Any student or family or individual that contacts a coach about attending a school where he or she coaches should be informed that they need to contact the principal, admissions department, or guidance department if they have an interest.

6. Any meeting with coaches regarding athletes or prospective athletes or their families should be at the request of the family to the individual(s) responsible for admissions and should take place at the school.

7. High school athletics is not the same as colleges recruiting high school athletes for college athletics. High school athletics exist for an entirely different reason. High school coaches should not view 12-, 13-, 14-year-old students in the same manner as college coaches view high school

seniors.

8. Administrators and coaches must realize that they have more responsibilities than the general public to understand the purpose of high school athletics, the principles behind the TSSAA rules, etc., and to maintain a level of understanding and purpose when dealing with the general public and students.

Amateur Rule

Section 22. A student who has never used and is not using his or her knowledge of athletics or his or her athletic skill for pay in the sports which this Association governs and who has always contested under his or her own name is an amateur. (Accepting money for officiating athletic contests or for working as an employee in a city or county recreation program is not a violation of this regulation.) A student who violates the amateur rule shall be ineligible for 12 months in the sport in which the violation occurs.
Such a student may be reinstated as an amateur after a period of one calendar year from the time he or she was declared ineligible has elapsed, provided he or she has not violated the amateur rule during this period.

A student who signs a professional baseball contract shall be ineligible to participate in high school sports after the signing of such contract.

Award Rule

Section 23. A student may accept a medal, trophy, high school letter, sweater, jacket, shirt, blazer or blanket but nothing else of commercial value. (A sweater, jacket, shirt, blazer or blanket must carry the high school letter or other appropriate award emblem.) None of the approved

awards shall be accepted from an individual or a non-school organization unless the giving of such award has been approved by the principal of the school the athlete attends. Acceptance of forbidden awards will cause a student to become ineligible for 12 months in the sport in which the violation occurs. Golf and tennis students will abide by USGA and USTA regulations in accepting awards.

Section 24. A member school that has any connection with the presentation of a forbidden award — such as assisting in the selection of the person to receive the award, permitting the award to be given at a school function, or holding the award for a student until he or she has graduated — shall be subject to penalty.

1.

Q. If a student accepts cash, merchandise or other compensation in a sport sponsored by TSSAA will he or she lose his or her eligibility in that sport?

A. Yes, competing for anything of commercial value during the school year or during the summer vacation is a violation of the award rule. (An exception to this would be in golf and tennis as regulated by USGA and USTA Award Rules.)

2.

Q. Is it a violation if an athlete permits his or her picture, name or personal appearance to be used for purposes of endorsing or promoting the sale of an article or service?

A. Yes.

College Attendance

Section 25. No person is eligible who has ever

attended college or who has played on a junior college, senior college, or university team.

Student Employment

Section 26. A student who is filling a place as librarian, monitor, secretary, janitor, waiter, or any other position for which that student receives a consideration shall be ineligible to take part in any athletic contest until the Executive Director shall have passed on the case and decided that the service rendered is adequate return for the concession made.

1.

Q. Is it permissible for a school to employ a student for summer work who has not attended the school the previous year?

A. No. In order for a student, who will be participating in athletics, to be employed by a school during the summer the student must have attended the school the previous school year.

Tuition and Financial Aid

Section 27. If tuition is charged, it must be paid by parent, bona fide guardian or other family member. If a parent, guardian or other family member secures a loan for payment of tuition, it must remain an obligation of the parents, guardian or other family member to repay the principle and interest in full with no exceptions. Financial aid will be allowed under the following conditions:

1. Children of full-time faculty members may be given financial aid, but such students, if transfers, shall be ineligible for 12 months in any sport in which they have an athletic record for the previous or current year.

2. Financial aid may be awarded on the basis of

need, but proof of such need must be filed in the TSSAA office on forms approved by the Executive Director. In order to determine the basis for need, all schools awarding financial aid shall use the School and Student Scholastic Service for Financial Aid of Princeton, New Jersey. A committee consisting of five School Heads from Division II schools, selected by these schools, and one ex-officio, non-voting member from the Board of Control will meet and make recommendations to the TSSAA Board of Control on each student submitted. In addition, this committee will collect information from schools regarding financial aid statistics, grant procedures, and the overall financial aid program within the school. The TSSAA Board of Control will then rule on all cases at the August meeting. The TSSAA Board of Control shall have authority to reject the basis for need for students when in its opinion, or the opinion of the school committee, the amount of need stated by School and Student Scholastic Service for Financial Aid of Princeton, New Jersey, cannot be justified.

3. Any loan program, grant program, educational foundation or similar program that is established and/or administered, in whole or in part, by a school or official of a school is considered financial aid.

Schools shall remove any student from athletic eligibility whose accounts with the school are 60 days overdue.

All records pertaining to financial aid or tuition assistance shall be open to TSSAA upon its request. Each school shall be responsible for securing necessary authorization to allow TSSAA to review or audit such records.

Specialized Camps

Section 28. All expenses of an athlete who attends any athletic camp where specialized instruction is offered in

any sport sponsored by TSSAA must be paid by the athlete or his or her parents.

Setting Aside Eligibility Rules

Section 29. No part of these eligibility rules shall be set aside by mutual agreement for any contests whatsoever nor shall they be supplemented in any contest held under the jurisdiction of this Association.

Special Cases Involving Hardship

Section 30. Except for the eligibility rules in regard to age and to the number of semesters in school, the Executive Director shall have authority to set aside the effect of any eligibility rule upon an individual student when in his opinion the rule fails to accomplish the purpose for which it is intended or when the rule works an undue hardship upon the student.

The conditions causing the student to fail to meet the eligibility requirements must have been beyond the control of the school, the student and/or his or her parents, and such that none of them could have reasonably been expected to comply with the rule the violation of which is involved.

If the student has transferred from another school, it is recommended that a statement be filed from the administration of the previous school regarding the transfer. (The statement shall explain why the transfer is being made and give any other information that should be taken into consideration in deciding whether the student shall be eligible to participate in athletics.)

Any decision of the Executive Director may be appealed to the Board of Control at the August, November, January or March meetings.

If any hardship appeal is received after one week prior to the Board of Control meeting, the school will have

to pay for additional expenses in order to get material to the Board.

Each school must have an administrator (principal, assistant principal or athletic director) from that school present in order to appear before the Board of Control regarding an appeal.

Physical Examination and Parental Consent

Section 31. It is required that no student be permitted to participate in practice sessions or in athletic contests until there is on file with the principal a preparticipation medical evaluation form signed by a properly licensed doctor of medicine that the student has passed a physical examination, not prior to May 1, and that in the opinion of the examining physician, the student is physically fit to participate in interscholastic athletics. Physician assistants and nurse practitioners may conduct routine preparticipation medical evaluations on athletes according to this form under the supervision of a physician or team doctor at the sole discretion of the TSSAA. The official signature on the form must be that of the supervising physician.

No student shall be required to submit to a physical exam if his/her parent(s) or legal guardian shall file with the principal a signed, written statement (affirmed under the penalties of perjury) declining such physical examination on grounds of sincerely held beliefs or practices.

It is required that no student be permitted to participate in practice sessions or in athletic contests until there is on file a parental consent certificate signed by a parent or legal guardian stating that the student has the consent of his or her parent(s) or legal guardian to participate.

Forfeitures

Section 32: All rulings on eligibility must be in writing, and the accidental, intentional or other use of ineligible players by a member school shall require that team victories in which the ineligible player participated are forfeited to opponents; and any one or more of these additional actions may be taken:

(a) That individual or team records and performances achieved during participation by such ineligibles be vacated or stricken;

(b) That team or individual awards earned by such ineligibles be returned to the TSSAA; and

(c) That a fine for the playing of an ineligible player be assessed against the school, if deemed necessary.

Section 33: If a team is removed from competition, the contest is forfeited to the opponent and the school will face disciplinary action by TSSAA. In addition, the coach and principal of the removed team must appear before the Executive Director to indicate why additional disciplinary action should not be taken.

Section 34: If the coach is ejected from the contest and an assistant coach or full-time employee of the board of education that possesses a teacher's certificate and is assigned as a school representative is not available to continue as coach, the event is terminated and forfeited to the opponent.

Section 35: If a student is ineligible according to TSSAA rules but is permitted to participate in interscholastic competition contrary to such TSSAA rules but in accordance with the terms of a court restraining order or injunction against his/her school and/or the TSSAA, and that injunction is subsequently voluntarily vacated, stayed,

reversed or finally determined by the courts that injunctive relief is not or was not justified or expires without further judicial determination, those actions stipulated in Section 32 shall be taken.

Section 36: If an ineligible contestant competes in a meet, match or tournament and any violation of TSSAA rules occurs, all points earned by that student, or by a relay team of which he or she may have been a member, in that meet or tournament are to be declared forfeited; and in team sports (baseball, basketball, football, girls soccer, soccer, girls softball and girls volleyball) the entire contest is forfeited.

* * *

ARTICLE III

Schools Which Member Schools May Play or Scrimmage	Intrastate Tournaments and Meets
Interstate Tournaments and Track Meets	Varsity Team
Eligibility Lists	Filing Schedule Reports
Coaches	Rules of the Game
Duties of the Principal	Number of Regular Season Football Games
Practice and Playing First Football Games	Football Bowl Games
TSSAA Sports Calendar	Jamborees
Conduct of Students	TSSAA Share in Tournament Receipts
Awards	Use of Tobacco

Schools Which Member Schools May Play or Scrimmage

Section 1. A member of the Tennessee Secondary School Athletic Association is permitted to play or scrimmage:

(a) Other members of this Association.

(b) Schools holding membership in the state high

school athletic associations of other states, and which associations hold membership in the National Federation of State High School Associations.

(c) Also secondary schools operated by any agency of state government (Schools must be in category 1, 2 or 3), provided all players allowed to represent such schools meet the TSSAA semester, transfer, scholarship, and award rule. Member schools that schedule athletic contests with schools of this type shall require such schools to file with them, and with the state office, a form which states that all students who will participate in the contest are eligible under their association rules and that they also meet the requirements of the TSSAA semester, transfer and scholarship award rules. (This form may be obtained from the TSSAA office.)

(d) One alumni game in any sport except football. Contests with college freshmen teams in track and field, baseball, girls softball, golf, tennis and girls volleyball provided such contests do not involve more than one TSSAA team and one college freshman team.

(e) Any school with grades 9 and above which is approved by the State Department of Education, State Department of Education approved agencies (Schools must be in category 1, 2 or 3) and/or the Southern Association of Colleges and Schools provided it has been approved in writing by the Executive Director. Such schools may compete with TSSAA member schools in regular-season contests and invitational tournaments or meets. In such contests TSSAA-approved officials will be used. Such schools will abide by the TSSAA eight semester and age rule.

(f) Any elementary or middle school with any combination of grades K-8 provided both the member school uses only students in grades 7 and 8 and the elementary or middle school uses only students in grades 7 and 8 and provided the non-member school is approved by the State Department of Education, State Department-approved agencies (Schools must be in category 1, 2 or 3.) and/or the

Southern Association of Colleges and Schools provided it has been approved in writing by the Executive Director. Such schools may compete with TSSAA member schools in regular-season contests and invitational tournaments or meets. In such contests TSSAA-approved officials will be used. Such schools will abide by the TSSAA four-semester and age rule.

Q. Will the TSSAA enforce verbal contracts?

A. No. All contracts, to be binding, should be written on the regular contract forms.

Intrastate Tournaments and Meets

Section 2. No member school shall enter any intrastate basketball, girls volleyball, wrestling, girls soccer or soccer tournament, or any intrastate track and field meet unless said tournament or meet is sanctioned in writing by the Executive Director. (This does not apply to dual, triangular or quadrangular track and field meets.)

Interstate Tournaments and Track Meets and Contests With Out-Of-State Teams

Section 3. The TSSAA is a member of the National Federation of State High School Associations.
All interstate tournaments or meets in track and field, tennis, golf, baseball, girls softball, girls soccer, soccer, cross country, girls volleyball, wrestling, basketball or football—also any single contest in any of these sports with an out-of-state team which involves a round trip exceeding 600 miles or any single contest with an out-of-state team that is sponsored by an individual or an organization other than a member school—must be sanctioned by the National Federation and the state associations concerned. Only one out-of-state trip involving travel in excess of 600 miles by a

team of a member school will be sanctioned during any one season.

Schools which participate in non-sanctioned tournaments, meets, or contests, shall be subject to suspension. Applications for the sanction of an interstate tournament, meet, or out-of-state contest involving travel of over 600 miles or the sponsorship of an individual or non-school organization shall be made to the Executive Director.

Q. Must all games with out-of-state teams be sanctioned by TSSAA, the other state association, and the National Federation?

A. No. Only those games which involve travel in excess of 600 miles round trip, and those games sponsored by individuals or organizations other than member schools require such sanction.

Q. May a TSSAA school participate in intrastate tournaments or meets that have not been sanctioned?

A. No. All intrastate tournaments and meets must be sanctioned by TSSAA, the other state associations concerned, and the National Federation.

Varsity Team

Section 4. There can be only one varsity team in any sport.

Eligibility Lists

Section 5. An eligibility list containing the name of each student who is to participate during the season in each sport shall be filed by the principal with the Executive Director and postmarked one week prior to the first contest. If a student whose name does not appear on the original eligibility list wishes to become a member of the squad, a supplementary form listing the student's name must be filed

with the state office before the student is allowed to participate. The penalty for violation of this rule shall be a fine of $25.00. Any school failing to file such reports promptly along with checks for penalty, after being notified by the Executive Director, shall be subject to suspension.

Filing Schedule Reports

Section 6. Member schools shall file with the state office a copy of the schedule in each sport one week prior to the first contest. Penalty for failure to file the schedule report one week prior to playing the fast contest shall be a fine of $25.00.

Coaches

Section 7. All coaches will fall under one of the following categories:

1. Full-time employee (a minimum of 100 school days) of the board of education with a Tennessee state teaching license or the equivalent.

2. Retired educator (five or more years experience) with a valid Tennessee state teaching license or the equivalent.

3. Non-faculty coach—Anyone approved by the principal, superintendent, and/or local board of education in the normal course of employment procedures in accordance with applicable state law.

A. The position has been advertised and no full-time employee with a teaching license who meets the qualifications required for coaching the specific sport in question is available.

B. All head coaches in football, basketball, baseball,

girls softball, and track and field must be full-time employees with a Tennessee state teaching license (see #1 above).

C. All non-faculty coaches who are not retired educators (see #2 above) must complete the NFICEP Coaches Education Program in a TSSAA-approved course within one year of his/her employment and must continue to renew this certification every three years by completion of additional NFICEP courses. In addition, all non-faculty coaches who are not retired educators must attend the TSSAA Coaches Training Meeting annually.

D. All head non-faculty coaches in girls volleyball, cross-country, golf, wrestling, tennis, girls soccer and soccer must complete the NFICEP Coaches Education Program in a TSSAA-approved course prior to assuming the position.

E. In using retired educators and non-faculty coaches, a school shall be limited to a total of two coaches in football and one coach in all other sports. The individuals may be assistant coaches in football, basketball, baseball, girls softball, and track and field, and they may be either head coaches or assistant coaches in all other sports.

F. All coaches are subject to the TSSAA rules and regulations as regular coaches and must conduct themselves in a manner becoming of a coach and representative of the school. All coaches are responsible to the principal of his/her school.

Coaches must be paid entirely from funds approved by the board of education or the governing board of the school.

Rules Of The Game

Section 8. The official rule books as published by the National Federation of State High School Associations shall be used in football, basketball, baseball, girls softball, wrestling, girls soccer, soccer, track and field and girls

volleyball. (Except for football and basketball, there shall be a $25.00 administrative fee for girls and boys teams participating in each sport. The $25.00 administrative fee shall be mailed to TSSAA prior to the playing of the first contest in each sport. Failure to send the $25.00 administrative fee prior to the first contest will result in an additional $25.00 late fee.)

Duties Of The Principal

Section 9. A principal shall furnish to the Executive Director such information as may be desired concerning eligibility of contestants, participation and reports on officials. Failure to comply within a reasonable time shall subject the school to suspension, fine or other penalty. Any eligibility or participation list shall remain on file in the principal's office for a period of not less than five years.

Number of Regular Season Football Games

Section 10. A football team shall be permitted to play a maximum of 10 games if it is participating in the football playoff series, 11 games for the first round of the football playoff series, 12 games for the second round of the football playoff series, 13 games for the quarterfinals of the football playoff series, 14 games for the semifinals of the football playoff series, and 15 games for the finals of the football playoff series. Schools that do not qualify for the fall playoff series may schedule an additional game for a total of 11 games.

Practice and Playing First Football Game

Section 11. There shall be no football practice in pads time the close of school until the date set for beginning fall practice. The date for beginning fall practice shall be August 1. A game may be played on Wednesday or

Thursday preceding the Friday of the first scheduled football game.

Football Bowl Games

Section 12. A school must participate in the TSSAA region football playoff series and win at least five games in order to be eligible to participate in a football bowl game. No member school may participate in a football bowl game if the opponent represents an out-of-state school.

Any football game scheduled after the fast Friday in September — if it is sponsored by a non-school organization — or any football game scheduled at any time — if the participating teams are not named at the time the game is scheduled — will be considered as a bowl game.

Sponsors of football bowl games shall obtain written approval from the Executive Director of TSSAA before scheduling such contests. No member school shall agree to play in a bowl game without first ascertaining that the proposed game has been approved by TSSAA.

SPORTS CALENDAR [Omitted]

* * *

Section 13. An invitational tournament shall count as two games in basketball, girls soccer, soccer, baseball and girls softball. All tournaments shall be held on consecutive days with no other regular-season games being played during the tournament unless permission is granted by the Executive Director.

In all individual sports (cross country, golf, track and field, tennis and wrestling) individuals accompanied by a coach may enter varsity competition at different sites at the same time and date, and this will count as two dates on the schools' schedule.

Any school that is starting a sport for the first time

may have five days of off-season practice prior to the first season the sport begins. This would apply to girls volleyball, girls soccer, soccer, baseball, girls softball and track and field. It would not apply to football and basketball since schools are allowed 10 days in these sports.

A school may open its facilities to all students in their school and coaches may serve in a supervisory capacity only. No practice schedules may be followed, the facilities must be open to everyone in the school, and coaches may serve in a supervisory capacity only.

In the summer, practice shall be limited in all team sports (football, girls volleyball, girls soccer, basketball, baseball, softball and boys soccer) to 10 days of school-against-school competition. In fall sports, this would apply to the period of time from the end of school until August 1 (opening day of practice). In other sports, this would apply from the end of the school year to the beginning of the following school year.

Q. The basketball squad is scheduled to practice during the sixth period. Is this a violation?

A. No. TSSAA practice restrictions are not enforced during the school day. Practice restrictions as outlined in the Sports Calendar apply at the close of the school day.

Q. After the school day has ended the gymnasium is left open and any student who wishes to shoot baskets, including members of the basketball squad, are allowed to do so. Is this a violation if it occurs at times other than those allowed under the sports calendar?

A. No. Schools may open their facilities with approval by the principal, provided the facilities are open to all students enrolled in their school. Coaches may serve in a supervisory capacity only. There can be no practice schedules, no requirements for players to attend, etc. The concept of "open facilities" allows school to use their facilities for all their students in a free play atmosphere with

coaches being allowed to serve in a supervisory capacity.

Q. A coach has a weight lifting program at school during off season. The program is on to both players and non-players. Is this a violation?

A. No, provided activities are limited to weight lifting, and provided no player is required to attend.

Q. Can a coach have a running program in the off season?

A. Yes, if it is a program that would benefit all students as long as it is open to all players and non-players.

Q. May a school with grades 7-12, 8-12 or 9-12 have 10 days of varsity spring football or basketball practice and 10 days of freshman spring football or basketball practice?

A. No. A school may have only 10n days of off-season practice in football and/or basketball.

Section 14. The sports season for a school shall end when the team has been eliminated from the TSSAA tournament series or has won the state championship. The sports season shall end for a school whose team does not enter the tournament series with the playing of the last regularly scheduled game.

Jamborees

Section 15. A member school may participate in one jamboree per sport provided (a) the jamboree is approved by the state office and is held before any of the participating schools play the first game; (b) the jamboree is sponsored by the participating schools and all proceeds go to the participating schools; (c) the jamboree is conducted in accordance with the following regulations:

A. The number of minutes in two regulation quarters of the

sport involved shall be the maximum time any one team shall play in a jamboree.

B. Registered TSSAA officials must be used.

C. Schools participating in a jamboree must file the regular eligibility report with the state office prior to participating.

D. Schools must hold membership in TSSAA or membership in a Tennessee conference in order to be eligible to participate in a jamboree. (Out-of-state schools must obtain approval from their state association before participating.)

E. Football schools may participate in a jamboree as early as Thursday of the week preceding the opening of football season.

F. Basketball schools may participate in a jamboree one week preceding the opening of basketball season. Participation in such a jamboree shall not count as a regular-season contest.

Conduct of Students

Section 16. A student who uses insulting or profane language or who is guilty of foul tactics, in addition to being disqualified by the referee shall be subject to such additional penalties as the Board of Control or Executive Director may deem best.

TSSAA Share In Tournament Receipts

Section 17. Fifteen percent of the gross proceeds from district and regional girls volleyball, district and regional girls soccer, district and regional soccer, regional track and field meets, invitational and regional wrestling tournaments, invitational, county, conference, district and regional basketball tournaments shall be paid to TSSAA. This regulation shall apply to junior division basketball tournaments, but not to "B"-team tournaments.

After all expenses in connection with the holding of the state tournaments in basketball, track and field, baseball, girls softball, girls volleyball, girls soccer, soccer and wrestling have been paid, any remaining funds from the gate shall be placed in the TSSAA treasury.

Awards

Section 18. TSSAA shall furnish trophies, plaques, ribbons and medals in TSSAA-sponsored sports as determined by the TSSAA Board of Control.

Use of Tobacco

Section 19: The use of tobacco in any form by coaches, officials, and athletes is prohibited at TSSAA sanctioned events.

Last Modified July 14, 1997

JA-204

TENNESSEE SECONDARY SCHOOL
[TSSAA LOGO] ATHLETIC ASSOCIATION

P.O.Box 319• 3333 Lebanon Road•Hermitage, Tennessee 37076
615/889-6740 Fax 615/889-0544

July 3, 1997

Mr. Bill Brown, Principal
Brentwood Academy
219 Granny White Pike
Brentwood, TN 37027

Dear Mr. Brown:

Enclosed is preliminary information obtained as a result of questions concerning potential violations of TSSAA rules by Brentwood Academy. The information is confidential and is a review of facts as we have them at this point. Please review and respond to the questions indicated by July 15, 1997.

Sincerely

/s/ Ronnie Carter

Ronnie Carter
Executive Director

RC: wmb

enclosures

[ENCLOSURE]

We have met with Mr. Bill Brown and requested a meeting with Mr. Carlton Flatt and Mr. Robert Butler, but Brentwood Academy requested that everything be placed in writing and that meetings could be set up at a later date. We have received written responses from Mr. Flatt and Mr. Butler. Any further meetings will be at the request of Brentwood Academy. In addition, we have talked with four student-athletes from two middle schools and six coaches from four middle schools.

After reviewing all information, the following facts have been established:

1. Coach Flatt left three tickets for a game at Brentwood Academy this past fall (1996) for Kevin Armstrong, middle school coach at Neely's Bend. Mr. Armstrong used the tickets for himself and two student-athletes at Neely's Bend Middle School.

   The information from Brentwood Academy indicates that any coach, teacher, or administrator from any school is admitted free to all athletic contests upon request to the athletic director. Mr. Flatt states that he had never heard of Mr. Armstrong until he called him about two students at Neely's Bend who would benefit from Brentwood Academy. The information from Brentwood Academy indicates that students above the sixth grade are not admitted free to football or basketball games. This would indicate that students below the sixth grade are admitted free.

   Follow-up questions:

   (1) How are all schools notified of this policy? Since the information indicates that any teacher at any school can be admitted free

upon request to the athletic director, how is this handled administratively with such a large number of schools and teachers involved?

(2) Are students below the seventh grade admitted to Brentwood Academy contests at no charge? Is this a blanket policy with a sign that says anyone below the seventh grade does not have to pay or are students in the sixth grade and below selectively admitted free to contests as either a group, team, etc.? If they are admitted in groups, please explain how this works.

2. Twelve students from nine middle schools participated in spring football practice in 1997 at Brentwood Academy. Information from Brentwood Academy indicates that none participated in 1995 and only one in 1996. The information indicates this policy was changed this year to include all male students who had applied to Brentwood Academy. The middle schools are from Williamson County, Davidson County, and Wilson County and include two schools that would be 45 minutes from Brentwood Academy. No transportation is provided by Brentwood Academy. The information from Brentwood Academy indicates that Coach Flatt called Ronnie Carter the last three years about students participating in spring practice to make certain the policy had not changed and that permission was given for students to participate in practice as they were accepted in admission and the school had written indication that they planned to attend Brentwood Academy – I find no record of any letter written to Brentwood Academy in the last three years granting any permission. Since there were no students participating in 1995 and only one in 1996, I

question why phone calls would have even been made in this area. The phone call would have dealt with the fact that students may participate in spring practice but this telephone call occurs many times with many coaches across the state and is generally followed up with the many pitfalls and dangers that will occur if students are permitted to participate, such as questions regarding transportation, insurance, exposure to liability, etc.

If Brentwood Academy has a letter granting permission, please enclose that with this information. I find no record on our telephone log regarding any information of the type that is indicated in your response.

3. The following coaches on the staff of Brentwood Academy are coaching AAU or church basketball teams this spring (1997):

John Patton –	15 and under AAU boys with five students on the team from Brentwood Academy who will either be freshmen or sophomores in 1997-98.
Brad Perry –	13 and under AAU boys
Robert Butler–	10 and under AAU girls 12 and under AAU boys

In addition, Mr. Butler coached a sixth grade girls teams in a church league with Mr. Bart King in the fall and winter of 1996.

4. Mr. Flatt has written letters to student-athletes at middle schools regarding spring football practice. The

information indicates this is done to students who have applied, been tested, and accepted. Information indicates that they must pay $300.00, but this , is not required if a student has applied for financial aid. In addition, Mr. Flatt has called students or their parents either at the request of Ms. Nancy Brasher, Admissions Director, or on his own. The information indicates this is done if there are questions concerning eligibility, but the information also indicates calls to parents or student-athletes regarding subjects other than eligibility, such as spring practice, spring practice being cut short, "athletic" questions, etc.

5. The information from Mr. Butler indicates little knowledge of the eight middle school student-athletes. He knows Mr. Patton as a fellow coach at Brentwood Academy and Mr. King through his work as chairman of the Brentwood Rotary Girls Basketball Tournament and through working with him as coach of a sixth grade girls basketball team in the fall.

6. Other information obtained in conversations with student-athletes or coaches at Neely's Bend Middle School, Cameron Middle School, Goodlettsville Middle School, and East Middle School is as follows:

   (1) According to a student-athlete at East Middle School, Mr. King started asking him if he wanted to go to Brentwood Academy two years ago. Also, Mr. King told him that if he went to Brentwood Academy, he would <u>probably</u> have a car when he is in the 10th grade. Mr. King gave a student-athlete from Cameron Middle School, as well as the student-athlete at East, the number for Brentwood Academy and told them to have their parents contact Mrs. Tate. Also according to this student-athlete, Mr. King is

recruiting two student-athletes from East and one from Cameron Middle School, and someone else is in charge of recruiting a student-athlete from Neely's Bend Middle School.

(2) According to a second student-athlete at East Middle School, Mr. King has bought his relative clothes, shoes, and jewelry and has told him that all he wants him to do is attend Brentwood Academy.

(3) According to a third student-athlete at East Middle School, Mr. King arranged for him and another student from East to take the entrance exam at Brentwood Academy. He also picked up the other student-athlete and took him to work with him, as well as bought the other student-athlete a bracelet.

(4) According to a coach at Cameron Middle School, Mr. John Patton has taken a student-athlete from Cameron to several Brentwood Academy football games.

(5) According to a coach at Goodlettsville Middle School, Mr. King is recruiting his best athlete and told that particular student-athlete that he would get him a scholarship and provide transportation to Brentwood Academy.

7. **We are requesting the following information from admissions: names of all students at the following schools who have contacted Brentwood Academy or have been contacted by Brentwood Academy regarding admissions, enrollment, application, etc. -**

- Neely's Bend Middle School, Goodlettsville Middle School, Cameron Middle School, and East Middle School

8. We are requesting that Brentwood Academy submit information in writing to follow-up questions #1 and 2 and respond to follow-up in paragraph #2.

In addition, we are asking the administrative staff and coaches at Brentwood Academy to review all the information and inform us of any part of it that is incorrect or any additional information that should be added to our findings. Specifically, we have received letters from Carlton Flatt and Robert Butler. There are also statements involving Coach Perry, Coach Patton, and Mr. King. Since the information from Brentwood Academy to us indicates that Mr. Butler and Mr. Flatt have had contact with Mr. King, we are asking Brentwood Academy to respond to any parts of information involving these individuals.

We are requesting, at this time, that there be no further contact on the part of the staff of Brentwood Academy or Mr. King with the following students: Jermonde Davis, Glean Eddy, Jesse Kellogg, Jacques Curry, Jarvis Curry, Altony Williams, and George King. We are also requesting that there be no further contact with the following coaches: Kevin Armstrong, Donnie Crenshaw, Clay Mays, and David Brooks.

9. We are also asking for information regarding "Brentwood Academy and Nashville Kats Football Camp" which is being held in Clarksville and Columbia Many of our member schools hold summer camps on

their campuses as a part of their summer program. This is the first incident, to my knowledge, of a school holding summer camps under the school name at sites other than their school campus. What is the connection with the Nashville Kats? What is the purpose of the camp? Does the camp have the approval of the administration of Brentwood Academy? Any other information regarding the camp that can be provided would be appreciated.

* * *

[LOGO] Brentwood Academy

219 Granny White Pike
Brentwood, Tennessee 37027
615-373-0611 FAX: 615-377-3709
EMail: Office@brentwoodacademy.com

William B. Brown, Jr.
Headmaster

July 15, 1997

Mr. Ronnie Carter, Executive Director
Tennessee Secondary School
Athletic Association
P.O. Box 319
3333 Lebanon Road
Hermitage, TN 37076

Dear Mr. Carter:

This letter is in response to a letter we received from you dated July 3, 1997.

First, before we respond to each of the specific items in your letter of July 3, we want to "clear the air" and communicate the spirit and attitude that we have at Brentwood Academy regarding the issues raised in your letter. In short, the attitude at Brentwood Academy is to comply with both the spirit and the letter of the TSSAA regulations. We have investigated this matter and we strongly feel that we have done nothing wrong. We are also willing to cooperate with your investigation.

When representatives of the TSSAA appeared at my office to request a meeting, I wanted to cooperate, but I already had a scheduled appointment. The reason Brentwood Academy has requested your staff call for appointments before meeting is simply to enable us to

conduct our business in an orderly manner. If we know someone from the TSSAA is coming, we can set aside the appropriate amount of time to discuss any matters the TSSAA wishes to raise. For the same reason, Brentwood Academy requested that the issues about which the TSSAA had a concern be placed in writing. It simply seems reasonable to make sure that everybody understands the agenda so that there will be no misinterpretation.

We are willing to meet and cooperate. We do not want this process to be confrontational. We have done nothing wrong, and we want to satisfy your concerns and resolve the issues raised in your letter of July 3. Mr. Flatt, Mr. Butler, and I have done everything in our power to respond professionally in writing, and we will continue to respond to your questions. We have nothing to hide.

In response to the specific issues raised in your letter, we would like to make the following points, in addition to the information which you have already been supplied.

1. ***Coach Flatt left three tickets for a game at Brentwood Academy this past fall (1996) for Kevin Armstrong, middle school coach at Neely's Bend. Mr. Armstrong used the tickets for himself and two student-athletes at Neely's Bend Middle School.***

Mr. Flatt has gathered as much information as he can about this first question, and to the best of his recollection, he left two tickets for a game at Brentwood Academy in the fall of 1996 for Kevin Armstrong. As he stated in his previous letter, Mr. Flatt told Mr. Armstrong that the tickets could not be used for any student in the seventh grade or above. Whether Mr. Flatt left two or three tickets, he specifically remembers telling Mr. Armstrong that the tickets could not be used for a student in grade 7 or above. Because Mr. Flatt did not know the caller except that he was a Metro public school coach, he discussed it with Coach Dalton. Mr. Flatt told him (Coach

Dalton) to remember this situation and that he (Mr. Flatt) had told Mr. Armstrong that the tickets could not be used for a student in grades 7-12.

The information from Brentwood Academy indicates that any coach, teacher, or administrator from any school is admitted free to all athletic contests upon request to the athletic director. Mr. Flatt states that he had never heard of Mr. Armstrong until he called him about two students at Neely's Bend who would benefit from Brentwood Academy. The information from Brentwood Academy indicates that students above the sixth grade are not admitted free to football or basketball games. This would indicate that students below the sixth grade are admitted free.

Clarification: Mr. Flatt states that he had never heard of Mr. Armstrong until he (Mr. Armstrong) called him (Mr. Flatt) about two students at Neely's Bend who would benefit from Brentwood Academy. Mr. Armstrong stated that he wanted information about the admission process and that he was calling several schools. Mr. Flatt told him that the parents would have to contact the school. The statement that "students below sixth grade are admitted free" is misleading. Upon request, some students sixth grade and below have been admitted free.

[2]

(1) How are all schools notified of this policy? Since the information indicates that any teacher at any school can be admitted free upon request to the athletic director, how is this handled administratively with such a large number of schools and teachers involved?

Brentwood Academy does not have a written policy regarding free tickets for coaches, teachers or administrators from different schools. This is simply a matter of Mr. Flatt, on behalf of Brentwood Academy, extending a courtesy to personnel and educators from other schools. Only upon request, has Mr. Flatt left tickets for

games for school personnel. Mr. Flatt even recalls joking with you on numerous occasions about how he feels about school personnel paying for sporting events.

Other schools are not notified of a "policy" because no official written school policy exists. Mr. Flatt only receives minimal requests for tickets. His estimation is approximately 10 per year. He does not keep any records of the people who call him but could provide a list of names from his memory upon request. When they call he simply instructs Coach Buddy Alexander to leave the appropriate number of tickets in an envelope at the ticket office, with the name of the person who called.

(2) Are students below the seventh grade admitted to Brentwood Academy contests at no charge? Is this a blanket policy with a sign that says anyone below the seventh grade does not have to pay or are students in the sixth grade and below selectively admitted free to contests as either a group, team, etc.? If they are admitted in groups, please explain how this works.

Likewise, there is no written policy to admit students below the seventh grade to Brentwood Academy contests at no charge. Mr. Flatt remembers two situations where two adults requested tickets for their families which included children below the seventh grade.

2. Twelve students from nine middle schools participated In spring football practice in 1997 at Brentwood Academy. Information from Brentwood Academy indicates this policy was changed this year to include all male students who had applied to Brentwood Academy. The middle schools are from Williamson County, Davidson County, and Wilson County and include two schools that would be 45 minutes from Brentwood Academy. No transportation is provided by Brentwood Academy. The information from Brentwood Academy indicates that Coach Flatt called Ronnie Carter the last three years about students participating

in spring practice to make certain the policy had not changed and that permission was given for students to participate in practice as they were accepted in admission and the school had written indication that they planned to attend Brentwood Academy—I find no record of any letter written to Brentwood Academy in the last three years granting any permission. Since there were no students participating in 1995 and only one in 1996, I question why phone calls would have even been made in this area. The phone call would have dealt with the fact that students may participate in spring practice but this telephone call occurs many times with many coaches across the state and is generally followed up with the many pitfalls and dangers that will occur if students are permitted to participate, such as questions regarding transportation, insurance, exposure to liability, etc.

Clarification: The policy on spring practice was not changed. It has always been true that students must be enrolled in order to participate in spring practice (not only accepted in admission but also enrolled which means the enrollment contract has been signed). What was changed was the procedure to notify all of the male students in ninth grade and above in writing.

Clarification: No students participated in spring practice in 1995 and two in 1996.

Clarification: Mr. Flatt has called you at least three times in the last three to five years that he can recall concerning spring practice. He has called you numerous times in the last 15-20 years about many eligibility problems and other situations and does not recall having received a written confirmation from you concerning many of the conversations. The phone conversation without written confirmation has been sufficient up to this point.

The second issue in your letter of July 3 concerns twelve students from nine middle schools who participated in spring football practice in 1997 at Brentwood Academy. To put this in context, and hopefully to refresh your

memory, Mr. Flatt called you with a question from the father of Ray Paul Marley, a Grassland Middle School student who will be attending Brentwood Academy this fall. Mr. Marley called Mr. Flatt and asked whether his son could participate in weight lifting and spring football practice at Brentwood Academy. Mr. Flatt told Mr. Marley that if Ray Paul was enrolled he could participate in spring practice. But since enrollment contracts are not due until April 1, he did not know if lifting weights would be allowed. Mr. Flatt called you and asked you about the situation. You informed Mr. Flatt that Brentwood Academy needed a letter from Mr. Marley stating that his plans were for Ray Paul to attend Brentwood Academy for 1997-98. Mr. Flatt called Mr. Marley and told him about the conversation with you. Mr. Marley wrote a letter. A copy is enclosed. Ray Paul lifted weights and attended spring practice (spring practice occurred after April 1 and by that time he had sent in his enrollment contract).

The clarification as to what prompted us to change our procedure in notifying all new male 9th-12th grade students who were enrolled in Brentwood Academy is as follows. Mr. Flatt became concerned that, since Mr. Marley is a teacher in the Williamson County system, there would be questions as to why Brentwood Academy had allowed Ray Paul and no one else to be involved in spring practice. Mr. Flatt did not want to have to go through the hassle with Franklin saying that Brentwood Academy just allowed one person to participate, so he discussed it with Mrs. Brasher, and it was decided that the best thing for Brentwood Academy to do in order to avoid controversy would be to send information to all of our male students who were enrolled in the ninth grade or above.

3. ***The following coaches on the staff of Brentwood Academy are coaching AAU or church basketball teams this spring (1997):***

John Patton–15 and under AAU boys with five

students on the team from Brentwood Academy who will either be freshmen or sophomores in 1997-98.

Clarification: All five of the Brentwood Academy students on John Patton's AAU team were previously enrolled at Brentwood Academy for the 1996-97 school year. Also, none of the other members of his team are candidates or have been candidates for admission to Brentwood Academy.

Brad Perry–13 and under AAU boys
Robert Butler–10 and under girls
12 and under AAU boys

In addition, Mr. Butler coached a sixth grade girls team in a church league with Mr. Bart King in the fall and winter of 1996.

Clarification: Mr. Butler did not coach a sixth grade girls' team in a church league with Mr. Bart King in the fall and winter of 1996. This was reported to you by us in error. Mrs. Brasher misinterpreted the following facts and reported to you that Mr. Butler and Mr. King coached this team together.

In October, 1996 Robert Butler was informed that Brentwood Academy's varsity girls' basketball team was not invited to the Brentwood Rotary Classic. This was a surprise and created a scheduling problem for Brentwood Academy. As a result, Mr. Butler called the tournament director, and she told him to contact Bart King and Rod Freeman because they were in charge of inviting the teams. She also told Mr. Butler that Mr. Freeman was not as involved as Mr. King, so she thought he should call Mr. King.

Mr. Butler called Mr. King and they talked about the tournament. These discussions with Mr. King extended over three days, as Brentwood Academy was trying to get back in the tournament. That was the first time that Mr. Butler ever talked to Bart King.

At the request of Mr. Steve Dunn, who was one of the parents of a player on the First Presbyterian Church

sixth grade basketball team, Mr. Butler was looking for a coach for that church team. Mr. Dunn had called Mr. Butler because he knew that Mr. Butler was involved with girls youth basketball and he thought Mr. Butler could help find a coach. In looking for a coach, Mr. Butler talked to Scott Holmes, David Knox and Ron Bargatze. Mr. Dunn talked to several former players at Vanderbilt and others about coaching the church team. He also asked Mr. Bargatze. Mr. Butler was asking anyone else who had a basketball background. During their conversations about the Rotary tournament, Mr. Butler told Mr. King about the search for a basketball coach that he and Mr. Dunn were conducting. Mr. King volunteered that he coached youth teams and said he might be interested. Mr. Butler called Mr. Dunn and told him there might be someone who might be interested in helping him.

Mr. Butler never coached any team with Mr. King.

4. ***Mr. Flatt has written letters to student athletes at middle schools regarding spring practice. The information indicates this is done to students who have applied, been tested, and accepted. Information indicates that they must pay $300.00 but this is not required if a student has applied for financial aid. In addition, Mr. Flatt has called students or their parents either at the request of Mrs. Nancy Brasher, Admission Director, or on his own. The information indicates this is done if there are questions concerning eligibility, but the information also indicates calls to parents or student-athletes regarding subjects other than eligibility, such as spring practice, spring practice being cut short, "athletic" questions, etc.***

Clarification: Mr. Flatt has called no students. Mr. Flatt has called no parents on his own whose children have not been enrolled. There is no "*et cetera.*"

Phone calls Mr. Flatt has made to parents of enrolled students have had a legitimate purpose. The phone calls made concerning spring practice were motivated by his

wanting to be sure the three points in question #9 of the memo to Ronnie Carter dated June 12 were correctly interpreted by the parents. Mr. Flatt called the people who had received letters to emphasize the fact that spring practice was only an opportunity for them and certainly was not anything that Brentwood Academy was pushing. In fact, Mr. Flatt prefers that eighth graders do not come to spring practice due to the fact that some of them may be intimidated by the situation. The other phone call Mr. Flatt made to parents of three of the twelve boys in spring practice concerned the fact that he was canceling the last day of spring practice. The call was made to keep them from making an unnecessary trip to Brentwood Academy.
Mrs. Brasher has asked Mr. Flatt as Athletic Director to call families who have called her with athletic questions. In a similar manner, Mrs. Brasher requests the Academic Dean and the Spiritual Life Director to respond to parents concerning questions that involve their respective areas.

5. ***The information from Mr. Butler indicates little knowledge of the eight middle school student-athletes. He knows Mr. Patton as a fellow coach at Brentwood Academy and Mr. King through his work as chairman of the Brentwood Rotary Girls Basketball Tournament and through working with him as coach of a sixth grade girls basketball team in the fall.***

Clarification: Mr. Butler did not coach with Mr. King. This is inaccurate as stated previously.

6. ***Other information obtained in conversations with student-athletes or coaches at Neely's Bend Middle School, Cameron Middle School, Goodlettsville Middle School, and East Middle School is as follows: (1) According to a student-athlete at East Middle School, Mr. King started asking him if he wanted to go to Brentwood Academy two years ago. Also, Mr. King told him that if he went to Brentwood Academy, he would <u>probably</u> have a car when he is in the tenth grade. Mr.***

King gave a student-athlete from Cameron Middle School, as well as the student-athlete from East, the number for Brentwood Academy and told them to have their parents contact Mrs. Tate. Also according to this student-athlete, Mr. King is recruiting two student-athletes from East and one from Cameron Middle School, and someone else is in charge of recruiting a student-athlete from Neely's Bend Middle School.

First, sub points 1, 2, 3 and 5 under issue no. 6 all have to do with allegations regarding the conduct of Mr. King. Mr. King is in no way associated with Brentwood Academy. Approximately four and one-half years ago, Mr. King talked to our Business Manager about using the gym. The inquiry by Mr. King was of a routine nature and was one of dozens of requests that Brentwood Academy receives from members of the community about using the Brentwood Academy gym or practice fields. It was our understanding that Mr. King was coaching a junior pro team. It was also our understanding that Mr. King lives in the Brentwood area. No coach was aware of Mr. King's being given permission at that time to use the gym.

In response to the allegations of sub point 1 under issue no. 6, we hope that they are not true. We do not know if these allegations are true or not, and we do not know the circumstances under which these allegations were made. We do not know if these statements were made under coercion, duress or intimidation. Upon further investigation, if these statements are true, then any student who has made such a statement is not the type of person we want at Brentwood Academy. If these statements are true, we do not want that kind of student in our school because he would be coming for the wrong reasons and we would feel that he would have been enticed, without any knowledge or action on the part of Brentwood Academy, to come to our school.

Whether or not Mr. King has done or said what has been stated in the other allegations we have no way of

knowing, but we would have grave concerns if these allegations are true and certainly would have notified TSSAA had we been aware that anything of this nature was occurring. Ronnie, we certainly can see why you have such a concern regarding the allegations of no. 6. It is very alarming to think that something like this has gone on or could have gone on, but understand that Mr. King is not a representative of Brentwood Academy. He is not and has never been a member of the faculty or staff of Brentwood Academy, has never had a child attend this school, and certainly has not been asked by any member of the faculty or staff of Brentwood Academy to encourage prospective students to apply to Brentwood Academy.

Mr. Flatt has related to me some pertinent information that involves Mr. Crenshaw at East Middle School. Doug Matthews called Mr. Flatt to inform him that Mr. Crenshaw had been in his store with Jacques Curry and, perhaps not knowing that Mr. Matthews has two children who are alumni of Brentwood Academy, had made the statement to one of the salesman that Brentwood Academy was going to buy Jacques a car if he would come there. Mr. Matthews heard this comment and was concerned, and he confronted Mr. Crenshaw about it in the store. Mr. Crenshaw said that Jacques had told this to him, so Mr. Matthews called Jacques over and asked him whether or not that was true. The boy denied it. Then Mr. Crenshaw said that though it might not be true in this situation, he certainly knows that Brentwood Academy does things like that.

Talk can be harmful, and we want to do anything in our power to eliminate this kind of talk because it certainly hurts our school. So many things have been said about Brentwood Academy over the years that are not true. We certainly want to work with you in any way to find out the truth about this situation and to stop such talk if it exists.

We do want to reiterate that Mr. King does not have a relationship with Brentwood Academy, just like several

other people who use our facility. Anything purportedly done by Mr. King cannot be and should not be attributed to Brentwood Academy. He has never had any affiliation with our school. Brentwood Academy has no control over Mr. King except that, if these allegations are true, we can certainly take away his use at our gym. I assume that you or someone from your staff has interviewed Mr. King to discuss these disturbing allegations against him, but I find no mention of this in your July 3 letter. What does Mr. King say about these allegations?

(2) According to a second student-athlete at East Middle School, Mr. King has bought his relative clothes, shoes, and jewelry and has told him that all he wants him to do is attend Brentwood Academy.

With respect to sub point 2, our response is the same as our response to sub point 1.

(3) According to a third student-athlete at East Middle School, Mr. King arranged for him and another student from East to take the entrance exam at Brentwood Academy. He also picked up the other student-athlete and took him to work with him, as well as bought the other student-athlete a bracelet.

According to Mrs. Brasher, Mr. King has not arranged with her for a student to take an entrance exam. Concerning the other allegation, our response is the same as in sub point 1.

(5) According to a coach at Goodlettsville Middle School, Mr. King is recruiting his best athlete and told that particular student-athlete that he would get him a scholarship and provide transportation to Brentwood Academy.

Our response is the same as sub point 1.

(4) According to a coach at Cameron Middle School, Mr. John Patton has taken a student-athlete from Cameron to several Brentwood Academy football games.

Mr. Patton states that in the fall of 1994, he took Jermonde Davis to a Brentwood Academy football game. Jermonde and Mikie, Mr. Patton's son, are friends as are Mr. Patton and Jermonde's family. Mr. Patton was functioning as a father to his son by allowing his son's friend to engage in social activities with his son. He certainly was not trying to influence Jermonde to attend Brentwood Academy.

7. We are requesting the following information from admissions: names of all students at the following schools who have contacted Brentwood Academy or have been contacted by Brentwood Academy regarding admission, enrollment, application, etc.—Neely's Bend Middle School, Goodlettsville Middle School, Cameron Middle School, and East Middle School.

We have not contacted any prospective student first. When a prospective family calls the Admission Office requesting information about Brentwood Academy, that phone call is treated with confidentiality. For that reason we do not think it would be appropriate for us to supply that information. In addition, we do not keep a list of students contacting Brentwood Academy by schools.

8. We are requesting that Brentwood Academy submit information in writing to follow-up questions #1 and 2 and respond to follow-up in paragraph #2.

In addition we are asking the administrative staff and coaches at Brentwood Academy to review all the information and inform us of any part of it that is incorrect or any additional information that should be added to our findings. Specifically, we have received letters from Carlton Flatt and Robert Butler. There are also statements involving Coach Perry, Coach Patton, and Mr. King. Since the information from Brentwood Academy to us indicates that Mr. Butler and Mr. Flatt have had no contact with Mr. King, we are asking Brentwood Academy to respond to any parts of information involving these individuals.

Please refer to the clarification under question no. 3. As

already explained, Mr. Flatt is responsible for the facilities and comes to the school periodically to check on things. Therefore he has seen Mr. King in our gym.

We are requesting, at this time, that there be no further contact on the part of the staff of Brentwood Academy or Mr. King with the following students: Jermonde Davis, Glean Eddy, Jesse Kellogg, Jacques Curry, Jarvis Curry, Altony Williams and George King. We are also requesting there be no further contact with the following coaches: Kevin Armstrong, Donnie Crenshaw, Clay Mayes, and David Brooks.

One of the requests that you make is that "there be no further contact on the part of the staff of Brentwood Academy or Mr. King" with the students identified in paragraph 2. We have absolutely no control over Mr. King, and Brentwood Academy refuses to acknowledge that we have any responsibility to monitor the actions of Mr. King, who is not associated with our school. How can Brentwood Academy be expected to control the actions of Mr. King? We are not in a position to control him. He is not a member of our staff and is not linked to Brentwood Academy in any way whatsoever. As previously stated, the only control we have over Mr. King is to not allow him to use our gym.

Mr. Flatt talked to Mr. King about your mandate that "there be no further contact on the part of the staff of Brentwood Academy or Mr. King with the following students...." Mr. Flatt told Mr. King that Mr. Carter said to have no contact with the stated students. Mr. Flatt also told Mr. King that he (Mr. Flatt) realized that he (Mr. Flatt) had no power over him but would appreciate it if he (Mr. King) would honor Mr. Carter's wishes. Mr. King was very concerned about why this request was made. At Mr. King's request, Mr. Flatt read him the allegations in no. 6, sub points 1, 2, 3 and 5. Ronnie, this puts us in the middle of a situation that we feel is uncontrollable. Please do not hold us responsible for any actions Mr. King may take.

No staff member at Brentwood Academy is aware of

Jarvis Curry. Mrs. Brasher and I are the only staff aware of Altony Williams because she tested him and I interviewed him; he was not accepted to Brentwood Academy. Mrs. Brasher had received a phone call from George King's mom, Mrs. King, seeking information about our school. Mrs. Brasher sent an admission packet and set up an appointment at Brentwood Academy. Mrs. King did not show up, and there was no further contact by either party.

Jermonde Davis, Glean Eddy, Jesse Kellogg and Jacques Curry are students who are enrolled at Brentwood Academy. We will need to contact these members of our 1997-98 freshman class just as we will do with other members of the class concerning various aspects of school during the coming year. I presume that TSSAA's request is not intended to prohibit such contacts. If that is not the case, please let me know immediately. No one at Brentwood Academy has ever had contact with Kevin Armstrong, Donnie Crenshaw or David Brooks apart from Kevin Armstrong's calls to Mr. Flatt as discussed earlier. We have had contact with Clay Mayes since he is a graduate of Brentwood Academy. His family and mine are close friends, and Clay has been involved with various activities at the school as an alumnus. Are you intending to restrict our ability to maintain our normal contacts with Mr. Mayes, and, if so, why?

9. ***We are also asking for information regarding "Brentwood Academy and Nashville Kats Football Camp" which is being held in Clarksville and Columbia. Many of our member schools hold summer camps on their campuses as a part of their summer program. This is the first incident, to my knowledge, of a school holding summer camps under the school name at sites other than their school campus. What is the connection with the Nashville Kats? What is the purpose of the camp? Does the camp have the approval of the administration of Brentwood Academy? Any other information regarding the camp that can be provided would be appreciated.***

You have requested information concerning the football camps that were held in Clarksville and Columbia. The Nashville Kats offered to sponsor these camps, and Mr. Flatt was interested in working with these camps because he needed summer income. The purpose of these camps for the Kats is to promote football in Middle Tennessee. The Nashville Kats receive the goodwill from promoting these camps and Mr. Flatt and staff obtain a summer job.

Mr. Flatt called the coach at Columbia High School, Spring Hill High School and Columbia Academy and told them about the camps and that he was working in the camps for a summer job. Mr. Flatt expressly stated that he was not interested in using the camps as a vehicle to encourage the student-athletes at Columbia or Spring Hill to come to Brentwood Academy. He invited the three head coaches to participate on the camp staff. Mr. Flatt made the same calls to Clarksville and Clarksville Northeast.

Brentwood Academy's administration approved the camp. We believe this answers the questions raised in paragraph 9, but Mr. Flatt will be happy to respond further to any additional questions.

Finally, we are sure that you can understand the stress that this has placed on Mr. Flatt and the others at Brentwood Academy. Mr. Flatt feels very strongly that these allegations have cast him in a false light and have hurt his reputation since he has received many phone calls from fellow coaches concerning allegations the TSSAA has made. In fact, one of his fellow coaches informed him of the investigation before TSSAA officials. This is very disheartening. We are all anxious to resolve these matters as expeditiously as possible. We want to work with you and your staff at resolving any questions you may have.

We look forward to the meeting we set with you on Wednesday, July 16, at 10:00 a.m. to discuss any remaining questions you may have and any additional information you may have developed from discussions with Mr. King and the

parents of the students involved. For the sakes of the schools, the coaches and most especially the students involved in these allegations, this matter needs to be resolved promptly and correctly in light of the events as they have actually transpired. I look forward to discussing this with you.

Sincerely,

/s/ Bill Brown
Bill Brown
Headmaster

enclosures

[ATTACHMENT]

To: Brentwood Academy
From: Joe Marley
Date: 1/21/97

It is our intention for Ray Marley to attend Brentwood Academy in the 1997-98 school year. Ray has my consent to participate in a speed and strength program at Brentwood Academy.

Joe Marley

/s/ Joe Marley

[ATTACHMENT]

[BRENTWOOD LOGO]
BRENTWOOD ACADEMY

219 Granny White Pike | Brentwood, Tennessee 37027
(615) 377-3632 | fax: (615) 377-3709

Athletic Director: Carlton Flatt | Asst. Athletic Director: Buddy Alexander

April 23, 1997

Having officially enrolled at Brentwood Academy, the TSSAA allows you to participate in spring football practice. If you are not currently involved in a sport at your school, we would like to invite you to practice with your new team. Equipment will be given out April 30th at 3:30 downstairs in the locker room.

Spring practice will begin May 1, 1997 and conclude on May 14, 1997. Practice begins at 3:20 and will be finished by 4:45. Due to the inconvenience to your parents, please do not feel that you must attend every practice. However, I do feel that getting involved as soon as possible would definitely be to your advantage.

In the near future, you will receive a letter outlining our summer workout program. If you have any questions, please call me at school 373-0611 x 119, or at home 373-0475. We are certainly glad that you decided to become an *Eagle*.

Your Coach,

Carlton Flatt

JA-230

MEMBERSHIP APPLICATION
Tennessee Secondary School Athletic Association

School Name Brentwood Academy
Address 219 Granny White Pike
City, State, Zip Brentwood, TN. 37027

Check the division(s) in which you will participate:

Senior High Division ✓

Junior High Division _____

Middle School Division _____

Membership Fee $ 300.00
This membership fee includes one year subscription to TSSAA News for each school at $10.00 per subscription.

I hereby agree that Brentwood Academy High School will conduct its athletic programs for the year 1996 in accordance with the rules and decisions of the TSSAA.

/s/ William S. Brown, Jr. 11/14/96
Principal's Signature Date

Return this card no later than December 31 along with check for membership dues to:
TSSAA, 3333 Lebanon Road, Hermitage TN 37076

JA-231

MEMBERSHIP APPLICATION
Tennessee Secondary School Athletic Association

School Name Brentwood Academy
Address 219 Granny White Pike
City, State, Zip Brentwood, TN. 37027

Check the division(s) in which you will participate:

Senior High Division ✓

Junior High Division __

Middle School Division __

Membership Fee $300.00

This membership fee includes one year subscription to TSSAA News for the principal and for head coaches at $10.00 per subscription.

I hereby agree that Brentwood Academy High School will conduct its athletic programs for the year 1997 in accordance with the rules and decisions of the TSSAA.

/s/ Bill Brown, Jr. — Principal's Signature

8-12-97 — Date

Return this card no later than December 31 along with check for membership dues to: TSSAA, 3333 Lebanon Road, Hermitage TN 37076|

JA-232

TENNESSEE SECONDARY SCHOOL
ATHLETIC ASSOCIATION

[TSSAA LOGO]

CERTIFICATION OF COMPLIANCE WITH TSSAA POLICY ON RECRUITING

This form must be completed in full, bear the signatures of all appropriate personnel and be returned to the TSSAA Office with your Directory Sheet.

INSTRUCTIONS (MUST BE TYPEWRITTEN):

1. This Certification of Compliance with the TSSAA Recruiting Policy must be submitted to the TSSAA Office with your Directory Sheet.

2. Make a photocopy of the completed and signed form for school files.

3. It is essential that the form bear the signature of the principal, atheletic director, and all coaches in each varsity sport offered by the school. If coaches in a particular sports(s) have not been determined, list TBA in the appropriate blank(s) and submit a photocopy of this form with that individual(s) signature after he/she has been determined and has reviewed the TSSAA Policy on Recruiting.

Name of School: Brentwood Academy

CERTIFICATION OF COMPLIANCE (Read Carefully)

With my signature, I certify that I have read the TSSAA Handbook on Recruiting which has been adopted by the Legislative Council and ~~agree to~~ comply with the provisions of this rule in full. I also certify that I will inform all necessary school personnel, as well as all other individuals associated with this school of the provisions of

this policy and of this school's intention to abide by those provisions. I also certify that I know of no one connected or not connected with our school who is in violation of the TSSAA Recruiting Rule.

POSITION	NAME (Must Be Typewritten)	SIGNATURE
Principal	Bill Brown	/s/ Bill Brown
Football (Head Coach)	Carlton Flatt	/s/ Carlton Flatt
Boys' Basketball (Head Coach)	Walt Holman	/s/ Walt Holman
Girls' Basketball (Head Coach)	Robert Butler	/s/ Robert Butler
Baseball (Head Coach)	Buddy Alexander	/s/ Buddy Alexander
Boys' Track (Head Coach)	Charlie Harper	/s/ Charlie Harper
Girls' Track (Head Coach)	Bill Brown	/s/ Bill Brown
Boys' Cross Country (Head Coach)	Charlie Harper	/s/ Charlie Harper
Girls' Cross Country (Head Coach)	Tracy Polte	/s/ Tracy Polte
Boys' Golf (Head Coach)	Vicki Capehart	/s/ Vicki Capehart
Girls' Golf (Head Coach)	Vicki Capehart	/s/ Vicki Capehart
Boys' Tennis (Head Coach)	David Speakman	/s/ David Speakman
Girls' Tennis	Jill Holmes	/s/ Jill Holmes

(Head Coach)		
Wrestling (Head Coach)	Ray Dalton	/s/ Ray Dalton
Boys' Soccer (Head Coach)	Charlie West	/s/ Charlie West
Girls' Soccer (Head Coach)	Charlie West	/s/ Charlie West
Softball (Head Coach)	Wendell Harris	/s/ Wendell Harris
Girls' Volleyball (Head Coach)	Karen Forehand	/s/ Karen Forehand
Assistant Coaches:	Mickey Jacobs	/s/ Mickey Jacobs
	Bobby Gentry	/s/ Bobby Gentry
	Bill Evans	/s/ Bill Evans
	Ron Harris	/s/ Ron Harris
	Brad Perry	/s/ Brad Perry

TENNESSEE SECONDARY SCHOOL
ATHLETIC ASSOCIATION
[TSSAA LOGO]

CERTIFICATION OF COMPLIANCE WITH TSSAA POLICY ON RECRUITING

This form must be completed in full, bear the signatures of all appropriate personnel and be returned to the TSSAA Offiee with your Directory Sheet.

INSTRUCTIONS (MUST BE TYPEWRITTEN):

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3. It is essential that the form bear the signature of the principal, atheletic director, and all coaches in each varsity sport offered by the school. If coaches in a particular sports(s) have not been determined, list TBA in the appropriate blank(s) and submit a photocopy of this form with that individual(s) signature after he/she has been determined and has reviewed the TSSAA Policy on Recruiting.

Name of School: Brentwood Academy

CERTIFICATION OF COMPLIANCE (Read Carefully)

With my signature, I certify that I have read the TSSAA Handbook on Recruiting which has been adopted by the Legislative Council and agree to comply with the provisions of this rule in full. I also certify that I will inform all necessary school personnel, as well as all other individuals associated with this school of the provisions of

this policy and of this school's intention to abide by those provisions. I also certify that I know of no one connected or not connected with our school who is in violation of the TSSAA Recruiting Rule.

POSITION	**NAME (Must Be Typewritten)**	**SIGNATURE**
Principal	Bill Brown	/s/ Bill Brown
Football (Head Coach)	Carlton Flatt	/s/ Carlton Flatt
Boys' Basketball (Head Coach)	Robert Butler	/s/ Robert Butler
Girls' Basketball (Head Coach)	Steve Shipley	/s/ Steve Shipley
Baseball (Head Coach)	Buddy Alexander	/s/Buddy Alexander
Boys' Track (Head Coach)	Charlie Harper	/s/ Charlie Harper
Girls' Track (Head Coach)	Bill Brown	/s/ Bill Brown
Boys' Cross Country (Head Coach)	Charlie Harper	/s/ Charlie Harper
Girls' Cross Country (Head Coach)	Charlie Harper	/s/ Charlie Harper
Boys' Golf (Head Coach)	Vicki Capehart	/s/ Vicki Capehart
Girls' Golf (Head Coach)	Vicki Capehart	/s/ Vicki Capehart

Boys' Tennis (Head Coach)	David Speakman	/s/David Speakman
Girls' Tennis (Head Coach)	Jill Holmes	/s/ Jill Holmes
Wrestling (Head Coach)	Ray Dalton	/s/ Ray Dalton
Boys' Soccer (Head Coach)	Charlie West	/s/ Charlie West
Girls' Soccer (Head Coach)	Charlie West	/s/ Charlie West
Softball (Head Coach)	Wendell Harris	/s/ Wendell Harris
Girls' Volleyball (Head Coach)	Randall Wilcher	/s/ Randall Wilcher
Assistant Coaches:	Bill Evans	/s/ Bill Evans
	Ron Harris	[illegible]
	Randy Locke	/s/ Randy Locke
	John Patton	/s/ John Patton
	Jimmy Gentry	[illegible]

TENNESSEE SECONDARY SCHOOL
[TSSAA LOGO] ATHLETIC ASSOCIATION

P. O. BOX 319 • 3333 LEBANON ROAD •
HERMITAGE, TENNESSEE 37076
615/889-6740
FAX 615/869-0544

July 29, 1997

Mr. Bill Brown, Principal
Brentwood Academy
219 Granny White Pike
Brentwood, TN 37027

Dear Mr. Brown:

This is in regard to questions concerning possible violations of TSSAA Bylaws by Brentwood Academy. Members of our staff have met with members of Brentwood Academy's staff concerning a number of items. In addition, there have been written responses from both our office and Brentwood Academy concerning these areas. We have also met with four student-athletes from two different middle schools and six coaches from four different middle schools concerning contacts with student-athletes in their schools.

After reviewing all of the information, the following is a summary of the concerns and violations:

1. Concern: The practice of providing free tickets for Brentwood Academy games to coaches at other middle schools. It is of great concern that the present policy is totally at the discretion of Coach Carlton Flatt, with Coach Flatt stating that two is the usual number. This leaves too many opportunities for middle school student-

athletes to be admitted at no charge.

Violation - Article II, Section 21 (Recruiting): It has been determined that at least one specific violation in this area occurred when a coach from Neely's Bend Middle School was left three tickets, with two being used by student-athletes. The response from Brentwood Academy is that the coach was told not to bring athletes above the sixth grade. The most critical part of understanding the "recruiting rule" is Guideline #8 which states:

> Administrators and coaches must realize that they have more responsibilities than the general public to understand the purpose of high school athletics, the principles behind the TSSAA rules, etc., and to maintain a level of understanding and purpose when dealing with the general public and students.

2. Concern:. There is only one reference to seventh grade and above in the questions and answers in the Recruiting Rule (Q. 4, example 4). Example #7 in Q. 4 specifically states that students being admitted free to contests is a guide in determining whether undue influence has been used. Brentwood Academy has indicated that students below the seventh grade would be admitted free to its games.

   Violation - Article II, Section 21 (Recruiting): It has been determined that there were at least two situations where students below the seventh grade have been admitted free.

3. Concern: The concept expressed by Brentwood Academy is that students that have gone through Brentwood Academy's "enrollment process" are seen

differently than other students in terms of TSSAA rules. It is critical first to understand that "enrolled," by TSSAA rules, means a student in regular attendance at a particular school. Students can only be enrolled at one school and each of the students in question is enrolled at a middle school.

It has been defined to our staff by Brentwood Academy that "enrollment" means a student or parents having made contact to Brentwood Academy, information and an application are then sent to the student and family, the student is then tested, the student is then accepted or rejected by Brentwood Academy and notified, and, if accepted, the family then signs a contract indicating the student will attend. We were first told that a student must pay a $300.00 deposit on tuition for the following year. We were then told that a student applying for financial aid does not have to pay the $300.00 fee. We were further informed that students have gone through the process and than not attended Brentwood Academy in the fall.

It seems very apparent that this process creates many opportunities for problems. It obviously does not assure Brentwood Academy that the students will be attending. It is also obvious that a family could go through this process at any number of schools.

Going through this simple process does not open the doors for Brentwood Academy to contact or treat these students in any different manner than students who have not gone through the process.

Violation - Article II, Section 21 (Recruiting): It is very apparent from talking with students and, also, Coach Flatt that students have been contacted by Brentwood Academy about athletics, both in writing and by

telephone, prior to the time they were "enrolled" under TSSAA rules. While the information indicates it is to inform them of opportunities, all of this could easily be a part of any application process. This is explained in Question #3, and examples 3 & 4 under Question #4 in Article II, Section 21, of the Bylaws.

Concern: Of 21 rising ninth grade students who have gone through this process, 12 received a letter from Mr. Flatt and follow-up telephone calls regarding participation in spring practice. While participation in spring practice by students enrolled in another school is not a violation in itself, for it to occur in the manner it has occurred resulted in going beyond what is normal and appropriate. In the past, Brentwood Academy has allowed this when it was initiated by a parent in their contact to Brentwood Academy. This resulted in none in 1995 and two in 1996. Only one had contacted Brentwood Academy concerning this in 1997. A change occurred this year to contact all new male students, with 12 participating. The 12 came from nine schools in three different counties, some as far away as 45 minutes:

Violation - Article II, Section 21 (Recruiting): This entire process is seen as beyond what is normal and appropriate and is undue influence.

5. Concern: Information from Brentwood Academy indicates three different members of the coaching staff (Robert Butler, Brad Perry, and John Patton) coach AAU basketball teams in the spring, with those teams involving 15-and-under boys, 13-and-under boys, 12-and-under boys, and 10-and-under girls. The 15-and-under boys have five students enrolled in either the eighth or ninth grade at Brentwood Academy.

It is of great concern to TSSAA that it was expressed by

Brentwood Academy in one meeting that TSSAA needs to do something about the AAU problem and at the same time has three members of their coaching staff involved with AAU teams. While this is not a violation, it is of deep concern that the coaches involved are with different age groups, starting with 12 and under. There is obviously the potential for undue influence.

Violation -- Article III, Section 13 (Sports Calendar): Brentwood Academy is in violation of the practice rule since a member of the staff is involved with a team (15-and-under boys) with five students presently enrolled in the eighth or ninth grade at Brentwood Academy. Two members of the AAU team were members of the Brentwood Academy high school program in 1996-97 and all five could be members in 1997-98. Schools are limited to 10 practices and two scrimmages in the spring involving a representative of the coaching staff and one or more members of the basketball program.

6. Concern: In talking with four student-athletes from two different middle schools and six coaches from four different middle schools concerning contacts with student-athletes in their schools, it was found that these contacts have come from persons connected with and persons not connected with Brentwood Academy. There is a recurring theme through all the interviews with students and coaches. Students are being singled out by someone based on athletic abifity. It would appear to be of major concern to Brentwood Academy that the only two students from Neely's Bend Middle School to be contacted, approved, and accepted are two top athletes. Neely's Bend is 45 minutes away. The only student to go through the process from East Middle School is also an outstanding athlete. This should cause great concern on the part of Brentwood Academy. The only student from Cameron to go through the process and be accepted is

also an outstanding athlete. Three of the four would be among the best athletes in the Metropolitan Public School System at the middle school level.

Violation: This is a violation of the Recruiting Rule. It is obvious that over and over we see persons exceeding what is normal and appropriate, as well as treating athletes and prospective athletes differently than students who are not athletes. At some point, examples 1, 3, 4, and 7 under Question 4 have all been violated.

After reviewing the concerns and violations, the following action is being taken:

1. For violation of the practice rule, Brentwood Academy will not be permitted any off-season practice in football or basketball for two years.

2. For violations of the recruiting rule, Brentwood Academy is being placed on probation for two years and fined $3,000.00. In addition, no athletic team will be permitted the privilege of entering the tournament series for 1997-98. The football program and boys' basketball program will also be denied the privilege of entering the playoffs and tournament series in 1998-99.

   Any further violations of TSSAA rules and regulations during the probationary period will result in further disciplinary action.

3. The two students at Neely's Bend, the student at Cameron, and the student at East Middle School will be ineligible to participate in athletics at Brentwood Academy at any level.

I know that you will take the necessary steps, as Headmaster of Brentwood Academy, to see that a violation

of this type does not occur again. High school athletics is a part of the total educational program. We cannot justify the existence of high school athletics if situations such as this are allowed to occur. Participation in high school athletics is a privilege and with that privilege goes responsibility. The responsibilities must be met by everyone involved with the Brentwood Academy athletic program.

If you have any questions concerning this, please feel free to contact me.

Sincerely,

Ronnie Carter
Executive Director

RC:wmb

cc: The Tennessean (to be mailed August 1, 1997)
Nashville Banner (to be mailed August 1, 1997)
Brentwood Journal (to be mailed August 1, 1997)
The Franklin Review-Appeal

Transcript of Proceedings
Taken August 13, 1997
Before te TSSAA Board of Control

[4]

(Whereupon, the following proceedings were had to wit:)

MR. CARTER: Bill, welcome. This is a hearing requested by Brentwood Academy as a result of the disciplinary action that was outlined in our letter of July 29th to Mr. Brown, Headmaster of Brentwood Academy. Article Six of our constitution states any school charged with violating TSSAA regulations shall be notified of such charges by the executive director. If a hearing is desired by the school involved, the executive director must be notified immediately in writing, which has been done. Provisions will be made for such a hearing and school so notified. Hearings are conducted by the executive director in the presence of two or more members of the TSSAA board of control to represent the grand division of the state in which the school is located and who shall act in an advisory capacity.

I will stop here for a minute. This is Morris -- Bill, I think you and Carlton probably know everybody. This is Morris Rogers from Huntland; Mike Hammons from Overton, Nashville Overton; Micky Dunn from Lawrence County. They are the three board of control members from the Middle Tennessee grand division.

After testimony has been heard, the executive director shall meet in executive session with the members **[5]** of the board of control who were present at the hearing. After discussing with the board members the evidence and possible penalties, the executive director shall decide what penalty, if any, is to be placed against the school. Obviously, through our process, the school can request an appeal to the full board after that.

This is not a court of law. It's a meeting of school

people dealing with a school problem. We're here to obtain any information that Brentwood Academy wishes to give to us today in addition to what has already been exchanged and in addition to what we have. The purpose is to provide you, Mr. Brown, the opportunity to present any additional information to us regarding either: One, the facts; two, the rules in question; or three, the penalty.

After hearing all of the testimony, after meeting with the board and their advisement, then I will notify Brentwood Academy in writing of the decision. If it's such that there can be notification today and you want me to call you tonight at home or something like that, you can see Wanda afterwards and make sure that I've got your telephone number at home, and I'll call you. At that time, also, after I have notified you, as head of Brentwood Academy, I will also notify the press, but we will not do that until after everything has been [6] determined between you and I in terms of the action today.

Any questions about the hearing, the process we're in? Bill, she's yours. I will turn it over to you.

* * *

[11

MR. NEBEL: [12] * * *Now, there's been a lot of discussion in the papers about sworn statements that were taken from witnesses. I want to tell you why we did that. When these allegations came out against Brentwood Academy, they went to the very core, the very heart of that institution and to the members who helped build that institution; Bill Brown, Carlton Flatt and the others. And when they asked me to get involved, they gave me one overriding instruction - we just want to know what the truth is, that's all we want to know, just get to the [13] truth.

So we went out and started to interview some of the people that we thought were involved in this process. In

particular, we talked to the families, because the very definition of undue influence is we want to find out what influenced these families to come and be a part of Brentwood Academy. And you will get a chance to hear them today, because we want to give you a chance to ask any questions that you've got yourselves.

We also talked to other people who we heard who were touched by this investigation, and we tried to get sworn statements from them, too.

The bottom line is this: If Brentwood Academy has done something wrong, we want to know it. The board of trust has established institutional control. They have given a mandate to Bill Brown to make sure that he does what is expected of him in all areas of school life, including athletics. They've given a mandate to Carlton Flatt to make sure that he does what he is supposed to do, and that includes abide by TSSAA regulations.

And what we hope to do today is to show you what our investigation has uncovered. We hope that you will see that we've got some facts that you might not have been aware of. We think that the decision that was rendered in July of this year is really the result of a **[14]** misunderstanding of the facts, a misinterpretation.

So one of the grounds of this appeal is we think that you all have misinterpreted -- when I say you all, I am talking about the TSSAA staff -- has misinterpreted the facts in this case.

The second grounds for the appeal is that we think that the letter imposing the sanctions has misinterpreted TSSAA regulations, especially in light of an interpretation that we were given by Mr. Carter concerning those recruiting regulations in 1993. And we are going to introduce a letter and some testimony about what the school's understanding of those regulations were.

And we will show you that those regulations were incorporated into a policy and procedure manual that the school lived by. I mean, they followed this. And they

thought they were following the rule, and, more importantly, the spirit of TSSAA rules.

Now, I know there's been a lot of talk out there because I hear it all the time. You know, Brentwood Academy wins. They must cheat. They must be recruiting. I hope we can get back past that emotional knee-jerk reaction and take a look at the facts in this case and decide this case based on the truth. Because the truth in this case is Brentwood Academy has not done **[15]** anything wrong. And if we have, we want to know who's done it, because we will take appropriate action. If Carlton Flatt is responsible for violating TSSAA regulations, we want to know it. And he's told me this. If he has violated the school's mandate, he wants to know it, because he wants to know whether he can continue to serve in the position of A.D. And if one of the coaches at Brentwood Academy has violated that mandate, then we want to know it, because we want to take appropriate disciplinary action.

The third grounds for our appeal is that the sanctions are too severe. These cases need to be looked at individually. The sanctions are especially too severe with respect to the four young men who have been declared ineligible. When you take a look at the facts of these cases individually, you will see that there is no reasonable basis to declare these young men ineligible at Brentwood Academy.

If somebody has done something wrong, let's tailor the punishment to fit the crime. If somebody has done something wrong, it's not these young men. If somebody has done something wrong, tell us who it is. We'll see that they're punished. You won't have to ask us to punish them. We'll take steps as we have in the past. Whenever we have found people at Brentwood Academy **[16]** who violated rules in the past, we self-reported, and we've taken steps to punish people.

* * *

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MR. NEBEL: Okay. The investigative file will be Exhibit No. 1. We've got Bart King's affidavit which we obtained from an attorney by the name of Richard Braun. This hasn't been marked. Let's make this Exhibit 13. We've got these individual sworn statements, and I'll just read them into the record here. I'm not sure we need to mark as an exhibit. There is one from Jacques Curry; one from Tracy Bell who is his aunt; one **[193]** from Jesse Kellogg; one from Mrs. Kellogg. The reason I am adding these is because there are details in these that we didn't cover on the stand. Mr. Kellogg. Of course, the Kelloggs didn't testify. Jermonde Cosby -- or actually, it's Jermonde Davis. It's misprinted here. His name is spelled Cosby on this. It's Jermonde Davis. Kathy Cosby; Otis Cosby, M.D.; Courtney Hale. This is a sworn statement from the other person who went with Coach Armstrong and Glean Davis (sic) and Jesse Kellogg to the game. This is a fellow who is now playing -- he is a freshman football player, I believe, at Hunter's Lane. And Courtney Hale has sworn that he saw both Glean Eddy and Jesse Kellogg pay for their own tickets.

* * *

[195]

* * *

So number one, factually, we think the overwhelming evidence is that there has been no violation. You know, we've asked who, and I understand that your response is we are not going to get any more information today on that. We've done the very best investigation we can to determine.

First of all, there is no intentional violation of the rules, and I understand you to say even if there has been no intent, we could violate the rules. But we've demonstrated there has been no violation of the rules, period. Jesse Kellogg and Glean Eddy did not go to that game for free. They bought their own tickets. We've got two sworn statements to that effect. In fact, we've got the statements from Mr. Kellogg and Mrs. Kellogg as well.

Now, I know that in light of the public school response, that the hard thing for you all to do is to take a look at this situation and to reverse the earlier decision. I understand that. But you need to understand that Brentwood Academy's integrity and the reputation has been attacked and has been smeared. It's even been smeared nationally. I mean, Sports Illustrated had a little blurb in the Score Card section of the magazine that painted Brentwood Academy and the coaches there as cheaters. And that's just not true. And it's made these young man look like they're willing to sell themselves to the highest bidder. And frankly, there has been no reason given to these parents that would justify why their children can't play at the school of their choice.

One of the disturbing things, as I have taken a look at this and I have talked to people about this is, and I say this with no offense intended to the public school educators. I mean, I went to a public school myself. I know that the public schools serve a valuable purpose and you all do a great job of what you're doing; but there seems to be a perception of ownership, ownership of these young men. I have heard the statements on numerous occasions that Brentwood Academy is winning these state titles with our boys. These are not anybody's boys. These are young men who have the right to choice to go to any school they want to. And you may not agree with the decision of these young men. You may not agree with the reasoning of their parents, but they've got the right to choose what they think is the best thing for their future.

And if you get away from that, if you get away from the concept that Brentwood Academy is taking our boys and winning championships with them, then I think a lot of this is resolved.

Brentwood Academy has done its part. They've been sensitive to the criticism that has been leveled publicly. They have been sensitive to the comments that you have made, Mr. Carter, over the years about walking too close to the line. And that's why they have intentionally embarked on a program to try to pull back. There is no institutional culture out there to try to win state championships. If you take a look at the policy manual that the trustees of that school has approved, you won't see a single word in there about state titles.

The fact of the matter is, Harvard gets a lot of smart people. Why? People are attracted to Harvard. Brentwood Academy does get more than its fair share of athletes, just like Harvard gets more than its fair share of scholars. But why? It's because people with athletic ability and who are interested in the triangle philosophy, including the spiritual side and the academic side, are attracted. There is nothing wrong with that. There is nothing illegal with that. That's why these young people have decided to go to Brentwood Academy. They have been attracted. They have not been influenced.

If the words unduly influenced are to have any meaning at-all – in fact, if the spirit of the TSSAA rules and regulations are to have any meaning at all, then the only fair decision is to allow these four young men to continue their careers where they want to and to drop this punishment against Brentwood Academy.

* * *

TSSAA HEARING
AUGUST 13, 1997

EXHIBIT LIST

1. TSSAA's file on Brentwood Academy
   - A. August 8, 1997, letter from Brentwood Academy to Ronnie Carter
   - B. July 29, 1997, letter from Ronnie Carter to Bill Brown
   - C. July 18, 1997, letter from Richard L. Colbert to Richard J. Braun
   - D. Carlton Flatt's statement
   - E. Students entering ninth grade
   - F. May 30, 1997, memo to Bill Brown from Ronnie Carter
   - G. July 3, 1997, letter to Bill Brown from Ronnie Carter
   - H. July 15, 1997, letter to Ronnie Carter from Bill Brown
   - I. Statements of Jaques Curry, Jaruis Curry, Altony Williams, Clay Mays, and David Brooks
2. Mike Peek's letter of February 24, 1993
3. Liz Tate's memo of April 19, 1993
4. Liz Tate's notes of conversation with Ronnie Carter
5. Liz Tate's Affidavit
6. TSSAA Rules
   - A. Section 21 (Recruiting Rule)
   - B. Question 1
   - C. Question 3
   - D. Question 4, No. 3
   - E. Question 4, No. 4
7. Sworn Statement of Jesse W. Kellogg taken August 1, 1997
8. Sworn Statement of Jermonde Q. Davis (Cosby) taken August 2, 1997

9. Sworn Statement of Jacques D. Curry taken August 1, 1997
10. Sworn Statement of William Glean Eddy, Jr. taken August 4, 1997
11. Brentwood Academy Trustee/Faculty Manual
12. Brentwood Academy Handbook
13. Affidavit of Bart King
14. Sworn Statement of Mrs. Kellog taken August 1, 1997
15. Sworn Statement of Mr. Kellog taken August 1, 1997
16. Sworn Statement of Kathy Cosby taken August 2, 1997
17. Sworn Statement of Otis Cosby, M.D. taken August 2, 1997
18. Sworn Statement of Ms. Marshall taken August 4, 1997
19. Sworn Statement of Tracey Bell taken August 1, 1997
20. Sworn Statement of Courtney Hale taken August 11, 1997
21. Enrollment Contract of Jesse W. Kellogg
22. Student Parent Agreement of Jesse Kellogg
23. Enrollment Contract of Jermonde Q. Davis
24. Student Parent Agreement of Jermonde Q. Davis
25. Enrollment Contract of Jacques D. Curry
26. Student Parent Agreement of Jacques D. Curry
27. Enrollment Contract of William Glean Eddy, Jr.
28. Student Parent Agreement of William Glean Eddy, Jr.

TENNESSEE SECONDARY SCHOOL
[TSSAA LOGO] ATHLETIC ASSOCIATION

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August 14, 1997

Mr. Bill Brown, Headmaster
Brentwood Academy
219 Granny White Pike
Brentwood, TN 37027

Dear Bill:

This is in regard to the hearing that was held at the Municipal Building in Fayetteville on August 13, 1997 at 4:00 p.m. at the request of the administration of Brentwood Academy concerning disciplinary action as outlined in my letter to you of July 29, 1997.

I would first commend you and representatives of Brentwood Academy who appeared in regard to this situation to provide additional information to our staff and the three members of the Board of Control who were also present.

It is difficult to summarize all of the information that was presented by Brentwood Academy. That information was reviewed by our staff and the three members of the Board of Control in a hearing that lasted four and one-half hours with an additional three-hour discussion period. In addition, we have reviewed all information previously submitted by Brentwood Academy.

After reviewing all of the information and the previously imposed penalties, the following disciplinary action is being taken:

1. In regard to the eligibility of the student-athletes:

A. Jermonde Davis – The student will be eligible to participate at all levels; provided he meets all other eligibility requirements.

B. Jaques Curry, Jesse Kellogg, and Glean Eddy – These students will be ineligible to participate in athletics at Brentwood Academy at the varsity level. They will be eligible to participate at the junior varsity level, provided they meet the age, semester, academic, and repeating rules. Participation at the junior varsity level will give these student-athletes an opportunity to be enriched by the total concept of the mission statement of the school, as related by Brentwood Academy representatives.

The students are ineligible as a result of Article II, Section 21, Question #2, of the TSSAA Bylaws which specifically state that violations of the Recruiting Rule shall cause the student to be ineligible at the school in violation, and a penalty shall be placed against the school.

2. For violations of the Recruiting Rule, Brentwood Academy is being placed on probation for four years and in addition, the football program and boys basketball program will be denied the privilege of entering the football playoffs and boys basketball tournament series in 1997-98 and 1998-99. All other sports will be permitted to enter the tournament series in the 1997-98 school year, provided there are no further violations. If there are any further violations during the period of probation, we will have no choice but to take further disciplinary action.

3. All programs participating in TSSAA tournament

series during the 1997-98 school year will share in no tournament revenues with member schools nor will they receive any expense allotments from state tournament series. Also, neither the football nor boys basketball program shall receive any tournament revenues or expense allotments during the 1999-2000 school year.

4. For violation of the Practice Rule, Brentwood Academy will not be permitted any off-season practice in football or basketball for two years.

5. The greatest concerns on the part of our staff are in regard to the lack of administrative control in many areas of the program. There is no suggestion of an intent to violate rules. There are, however, procedural areas that must be improved.

As a result, Mr. Bill Brown, Headmaster of Brentwood Academy, and Mr. Bill Youree, Chairman of the Athletics Committee on the Board of Trust, will meet with the Executive Director to review all policies and procedures in regard to the athletic program. It will then be the responsibility of Mr. Brown and Mr. Youree to develop an administrative control plan that will move the program forward and help to solve the problems that have occurred.

In reviewing the violations, they are summarized as follows:

1. Student-athletes have been admitted free of charge to athletic contests. Again, the question is not in regard to the policy, but in regard to the procedure that is used by Brentwood Academy. Tickets have been made available to uncontrolled individuals. Coach Carlton Flatt indicated that the pass gate was eliminated because they felt there was potential for abuse. Tickets being left for individuals in the manner in which Brentwood

Academy has done has the possibility for abuse as well.

2. Contact with the student-athletes by Brentwood Academy while they are enrolled at other schools. Much time has been spent on the definition of "enrolled" as set forth in the TSSAA Bylaws as opposed to the definition used by Brentwood Academy. The statement has been made that Brentwood Academy cannot operate under the definition of "enrolled" as set forth in the TSSAA Bylaws. In simple terms, Brentwood Academy, as a member school, must either find a way to operate under the definition as set forth in the TSSAA Bylaws, as do other member schools, change the definition as set forth in the Bylaws through the legislative process, or choose to no longer be a member of the organization.

It is very apparent that both public schools and independent schools can operate under that definition and still accomplish any goals they have in submitting information to students and/or families. Information regarding beginning of practice, physical forms, team meetings, etc. can be made a part of the application process, can be part of the information sent with the contract when students have gone through all other phases of the Brentwood Academy registration process, or can be advertised in local papers in the same manner as many schools do in regard to the beginning of practice, physical examinations, team meetings, etc. When student-athletes or their parents contact the school, it is obviously permissible for proper representatives to answer any questions in that meeting or provide information. The violations that have occurred in this particular situation are the initiation of contact a second time in writing regarding spring practice with the initiation of a follow-up telephone call by Coach Flatt to the students and/or families. Again, we recognize that

there was no intent to violate the rules by Coach Flatt but violations nonetheless occurred.

3. In presenting the information, a great deal of the explanation by Brentwood Academy involves recollection of telephone calls and a 1993 letter purportedly summarizing a meeting with representatives of Brentwood Academy and the Executive Director regarding TSSAA rules. It is very apparent to all of us, I would hope, that many problems can result by trying to remember telephone calls, interpretations of interpretations, etc. It would be our hope that out of this situation, Brentwood Academy will recognize the need to go back to the questions and answers in the TSSAA Handbook regarding recruiting and the guidelines for understanding the recruiting rule. We all recognize that questions will arise, but the questions in the handbook and the guidelines are the first source for answers. It would be our hope that all of this will be part of the beginning of the meeting with Mr. Brown, Mr. Youree, and the Executive Director.

If you have any questions regarding this, please feel free to contact me.

Sincerely,

/s/ Ronnie Carter
Ronnie Carter
Executive Director

RC:wmb

JA-259

Transcript of Proceedings

Taken Saturday, August 23, 1997

Before the TSSAA Board of Control

BOARD MEMBERS PRESENT:

MIKE REED	MIKE HAMMOND
HARRY DURHAM	JOHN DIXON
SAM MILES	LYNN BROWN
MICKEY DUNN	FRED KESSLER
	MORRIS ROGERS

ON BEHALF OF BENTWOOD ACADEMY:

G. THOMAS NEBEL, ESQUIRE
501 Union Street, Suite 504
Nashville, Tennessee 37219

Prepared by:
Carole Kimmel-Briggs, CSR
Briggs & Associates
501 Union Street, Suite 502
Nashville, Tennessee 37219

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(Whereupon, the following hearing was transcribed as requested.)

MR. REED: This is a hearing requested by Brentwood Academy as a result of disciplinary action outlined in the letter to Mr. Brown from Ronnie Carter on August the 14th. If the board members will turn to Article 6 of the TSSAA Constitution on page 5 regarding hearings. Section 1, this pretty much states that the schools are entitled to a hearing. If you look at Section 2, the hearing shall be conducted by the executive director in the presence of two or more members of the TSSAA Board of Control who represent the grand division of the state in which the school is located and who shall act in an advisory capacity.

After the testimony has been heard, the executive director shall meet in executive session with members of the board of control present at the hearing. After discussing with the board members the evidence and possible penalties, the executive director shall decide what penalties,

if any, to be placed against the school. Section 3, any decision of the executive director may be appealed to the board of control.

The previous hearing was held at Fayetteville on August 13th before three middle school -- excuse me – [5] three Middle Tennessee Board of Control members who make up the Second Athletic District. Brentwood Academy is now appealing the executive director's decision before the entire board of control.

It should be understood that this board can uphold the executive director's penalty, it can increase the penalty or it can reduce the penalty.

The format we will be following, this is not a court of law. It's an appeal before a board of school people dealing with a school problem. The board wants to hear the important parts of this appeal. The members of the board may have questions as we move along. This hearing will end at promptly 3:30 p.m. The board will do the same as it did in the other hearing. The board will then go into executive session. A decision will be made, and Mr. Brown will be notified of the board's decision as soon as possible.

One thing we need to note. We all have read the newspapers. We read that new allegations have surfaced against Brentwood Academy. What was in the newspaper yesterday and today is not a part of this hearing. This hearing only involves the penalties described in the August 14th letter to Mr. Brown from Ronnie Carter.

With that, Mr. Brown, I will say that all [6] members of the board have the letters of correspondence between the executive director and Brentwood Academy. The three Middle Tennessee members are probably a little bit more up to date. The other six have read everything that has been involved.

We are here to hear what you have to say. Again, I want to stress to you this is not a court of law. We want you to feel free to tell us any new information or anything that you have concerning the case. We will listen. I am going to

turn it over to Mr. Brown, the headmaster of Brentwood Academy.

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* * *

Now, the question is whether these three families that are the subject of the letter of August the 14th, 1997 and Brentwood Academy are guilty of recruiting violations, whether these three families were wrongfully recruited by Brentwood Academy. And we've decided the best thing we can do -- first of all, we don't want to take your time and repeat everything that went into that four-and-a-half-hour hearing earlier. So what we want to do is, first of all, make the transcript available from that hearing and also the exhibits. And then we have taken the liberty of condensing the four-and-a-half hours of video tape into a 38-minute video tape summary from that hearing. The 38 minutes -- we've worked pretty hard at this -- we think capture the high points of our presentation at the last hearing.

I would hope that it doesn't take the full two-and-a-half hours to make our presentation. We're going to do the best that we can. Certainly, we will live within that two-and-a-half-hour limit, but if you will bear with us and allow us to present that 38-minute video, then I think that will help expedite the process and we won't have to repeat everything that we did down in Fayetteville. Mr. Reed, is that acceptable with you

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[73]

* **

JACQU-ES CURRY,
was examined and stated as follows:

EXAMINATION BY MR. NEBEL:

Q. Jacqu-es, you're going to have to speak up because these gentlemen and ladies need to hear what you have to say. Would you state your full name.

A. Jacqu-es Curry.

* * *

[76]

* * *

Q. Now, there's been some discussion in the newspaper and otherwise about a gentleman by the name of Bart King. Would you please tell this board of control about your relationship with Bart King.

A. He is my AAU coach.

Q. And as an AAU coach, have you developed a special relationship with him?

A. Yes, sir, we're friends.

Q. Friends?

A. Yes.

Q. Have you sometimes referred to him as your dad?

A. Yes, sir.

Q. Why?

A. Because he has been there for me. When my mother died and my grandmother died, he stayed by me.

Q. Again, I want to make sure that you hear that. He says because he's been there for him. His mother died, and his grandmother died, and he's been there to help him. Now, has Mr. Bart King ever promised you a car or anything else if you would apply and attend Brentwood Academy?

A. No, sir.

Q. What has he told you about where he wants you to go to school?[77]

A. He doesn't care where I went.

Q. He doesn't care?

A. No.

Q. Have you talked to Mr. King about a number of schools that you might attend?

A. He had talked to me about a number of schools.

* * *

[80]

* * *

MR. NEBEL: Does the board have any questions?

MR. CARTER: Jacqu-es, I don't have any questions for you about Brentwood. You ran through a string of schools there that you and Mr. King talked about a few minutes ago. You said you all talked about Antioch, Stratford and Glencliff and just a bunch of them. Your understanding or when you all were talking about all of those schools, how -- now, I don't mean to ask you about transportation, but how were you going to [81] go to all of those schools? Did you just think that you could go to any of them?

THE WITNESS: No.

MR. CARTER: Help me with the discussion with Mr. King. In other words, why were you all discussing all of those others?

THE WITNESS: Because I was looking for a school to go to. You all said I couldn't play basketball. So I wanted to find another school.

MR. CARTER: Stay with that group. Do you know where you are zoned to go to school?

THE WITNESS: Yeah, Maplewood.

MR. CARTER: How were you going to go, in your mind or in yours and Mr. King's discussion, to Antioch, Stratford, Glencliff or any of those others?

THE WITNESS: I ain't for sure. But, like, it wasn't me going to the schools and talking to the headmaster or nothing. We was just looking at the schools. But at the time -- like, this happened in the last two or three years.

MR. CARTER: Right, but your understanding or your knowledge, you feel that you could just go to Antioch, Stratford, Glencliff, any of them?

THE WITNESS: My daddy, he live in the zone of Antioch and Overton.

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MR. NEBEL: Any other questions? That's going to be it for our proof. If I could make just a few concluding remarks.

By the way, we have Bart King here to answer **[91]** any questions. And it was our intention to put him on, but I don't know if you all are interested in extending for five minutes to hear from Bart King or not. He's here if you want him.

MR. CARTER: No.

MR. NEBEL: No. All right. I'm going to take off my lawyer hat for a minute, and I'm going to ask you all to just talk person to person, which is what I want to do. Because I have a real strong feeling that what is going on here is not in anybody's best interest. You know -- and by that I mean, we're not here to talk about what was in yesterday's paper. But the fact --

the things like the allegations that appeared in yesterday's paper shows that this thing is escalating.

* **

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August 23, 1997

Mr. Bill Brown, Headmaster
Brentwood Academy
219 Granny White Pike
Brentwood, TN 37027

Dear Bill:

This letter is in response to your appeal before the Board of Control at the Sheraton Music City on Aug. 23, 1997.

First, on behalf of the entire Board I commend you and those who appeared on behalf of your school as they delivered information to us. Our Board took time to thoroughly review all the information that was presented today and that had been previously submitted to the state office.

After reviewing and having a detailed discussion on all of the information, the Board's determination is that the following violations of TSSAA regulations occurred:

1. Student-athletes have been admitted free of charge to athletic contests.

2. Contact with student-athletes, initiated by Brentwood Academy, while those students were enrolled at other

schools.

3. Brentwood Academy coaches conducting impermissible off-season practice with Brentwood Academy student-athletes.

The details of each of the foregoing violations have been described in previous correspondence from TSSAA Executive Director Ronnie Carter. In order to communicate the decision of the Board of Control to you as soon as possible, I will not take the time to reiterate the factual details of the foregoing violations.

The Board of Control has determined that the appropriate penalty for the foregoing violations are as follows:

1. The entire athletic program of Brentwood Academy will be on probation for four years. If there are further violations during the probationary period, TSSAA will have no choice but to take further disciplinary action.

2. Brentwood Academy's football and boys' basketball programs are suspended from the TSSAA playoff series for the 1997-98 and 1998-99 school years.

3. Brentwood Academy is fined $3,000 for the above violations.

4. The Brentwood Academy football and boys' basketball programs will not be permitted to engage in off-season practice in the 1997-98 and 1998-99 school years.

5. Appropriate administrative officials of Brentwood Academy will meet with the TSSAA Executive Director to develop an administrative control plan to

help guard against future problems like those which precipitated this action.

The portion of the previous penalty pertaining to tournament series revenue has been removed. In addition, the Board of Control has decided that no student-athletes should be declared ineligible based on the foregoing violations provided they meet all other eligibility requirements.

Notwithstanding the modifications of the previous penalties by the Board of Control, the foregoing violations are serious. While there is no indication of a deliberate intent to violate TSSAA rules by Brentwood Academy officials, the Board of Control concurs with the Executive Director's concern about a lack of appropriate administrative control in various aspects of the school's athletic program. These concerns will have to be addressed in the administrative control plan to be developed.

Sincerely,

Mike Reed
President, TSSAA Board of Control

MR:wmb

cc: Ronnie Carter

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION

* * * *

EX OFFICIO MEMBERS OF BOARD OF CONTROL AND LEGISLATIVE COUNCIL

State Board of Education	Gary Nixon/J.V. Sailor
State Department of Education	Jim Swain/Jane Walters
TN School Boards Association	George Nerren/ Patrick Smith
TN Organization of School Superintendents	Ernestine McWherter
TN Athletic Coaches Association	Jim Cartwright
TN Association of Independent Schools	Barbara Dausch
TN High School Athletic Administrators Association	Scott Brunette

* * * *

Last Modified February 10, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

BRENTWOOD ACADEMY, Plaintiff, v. TENNESSEE SECONDARY SCHOOLS ATHLETIC ASSOCIATION and RONNIE CARTER, Executive Director and Individually, Defendants.	)	NO: 3-97- 249 JUDGE CAMPBELL MAG. JUDGE HAYNES

[FILED]
[JUNE 1, 1998]
[U.S. DISTRICT COURT]

COMBINED STIPULATIONS

In accordance with Case Management Order No. 1, Plaintiff Brentwood Academy and Defendants Tennessee Secondary Schools Athletic Association and Ronnie Carter submit these joint stipulations of fact designed to reduce discovery.

For purposes of this lawsuit and for no other purposes, the parties stipulate that the following facts are true:

I. Jurisdiction and Venue

1. This Court has personal jurisdiction over the parties and subject matter jurisdiction of the claims in this lawsuit.

2. Venue is proper in this Court.

II. Parties

A. Plaintiff Brentwood Academy

* * *

8. Although Brentwood Academy has had success in many sports, its achievements in football have received the most public attention. The football team, under Head Coach and Athletic Director Carlton Flatt, has won nine football championships and finished second six times since 1974.

9. Brentwood Academy is a member of the TSSAA, and the school's interscholastic athletic teams regularly participate in athletic contests regulated by the TSSAA.

B. TSSAA and Carter

10. Defendant TSSAA is a non-profit corporation organized and existing under the laws of the State of Tennessee, with its principal place of business in Hermitage, Davidson County, Tennessee.

11. Defendant Ronnie Carter is the Executive Director of the TSSAA and, at all times relevant to this action involving Brentwood Academy, acted as an employee and agent of the TSSAA and within the scope of his authority as an employee and agent.

12. The TSSAA is a voluntary association of public, independent and parochial secondary schools from across the state of Tennessee. It is composed of 290 public schools and 55 independent and parochial schools. Public high schools compose 84% of the voting membership of the TSSAA with 290 public schools participating in the TSSAA out of a total of 345 schools. Independent and parochial schools compose 16% of the voting membership of the TSSAA (55 independent and parochial schools out of a total of 345 schools). The purpose of the TSSAA is to stimulate and regulate interscholastic athletic competition among its member schools.

* * *

D. The Illegal Recruiting Controversy

* * *

35. Allegations that Glean Eddy, Jesse Kellogg, Jermonde Davis and Jacques Curry were recruited in violation of the Recruiting Rule were made in the first instance by certain public high school coaches.

36. These allegations of recruiting were subsequently communicated to Scott Brunette, the director of high school athletics for the Metropolitan Nashville Board of Education.

37. Brunette, in turn, communicated the allegations to the TSSAA.

38. Based on communications with Brunette, the TSSAA, through Defendant Carter, began an investigation into the allegations against Brentwood Academy. TSSAA Assistant Executive Directors Bernard Childress and Gene Menees interviewed Jacques Curry and Jesse Kellogg, two of the four students involved. Menees and Childress did not interview Jermonde Davis or Glean Eddy, the other two students. Menees and Childress talked with six public school coaches in the course of their investigation.

39. On July 29, 1997, Brentwood Academy was notified by Defendant Carter that the TSSAA had found Brentwood Academy guilty of multiple violations of the Recruiting Rule. This information was communicated to Brentwood Academy in the July 29, 1997 letter from Defendant Carter attached as Exhibit D.

40. The TSSAA has stated that Coach Flatt had no intention of violating the Recruiting Rule by mailing the Spring Practice Letters and making the telephone calls.

41. Defendant Carter's initial findings and penalties are accurately described in the July 29, 1997 letter from Defendant Carter to Brentwood Academy that is attached

as Exhibit D.

42. Under TSSAA procedures, Brentwood Academy appealed to the full Board of Control at a hearing held on August 23, 1997, at the Music City Sheraton Hotel in Nashville. The members of the Board of Control who ruled on this second appeal were: Mike Reed of Morristown, President; Harry Durham of Memphis, Vice-President; Lynn Brown of Maryville; John Dixon of Benton; Morris Rogers of Huntland; Mike Hammond of Nashville; Mickey Dunn of Lawrenceburg; Fred Kessler of Bolivar; and Sam Myles of Dyersburg. Rogers, Hammond and Dunn had listened to the evidence in the first appeal.

43. The Board of Control's findings and penalties are accurately described in the August 23, 1997 letter from Mike Reed to Brentwood Academy attached as Exhibit E.

44. By electing to be a member of TSSAA, each member school agrees to abide by the Constitution and By-laws of TSSAA.

45. According to the TSSAA Constitution, the TSSAA By-laws are passed by a Legislative Council consisting of nine members elected by TSSAA member schools.

46. According to the TSSAA Constitution, the TSSAA By-laws are enforced by a Board of Control consisting of nine members elected by TSSAA member schools.

47. In 1990, a three-member committee of the Legislative Council was appointed to review the recruiting rule and propose additional questions and answers and guidelines for interpreting the rule in various situations. The committee included Jim Pfifer, who was Vice President of the Legislative Council and principal of Notre Dame High School in Chattanooga, a non-public TSSAA member school. The result of this committee's work was the addition to the TSSAA handbook of new "questions and answers" pertaining to the recruiting rule.

48. In the 1992-93 TSSAA handbook, which was published and distributed prior to January 1, 1993, new "Guidelines for Understanding the 'Recruiting Rule' and

Understanding 'What's Undue Influence?'" were added to the TSSAA handbook. The first of these guidelines provides:

> "The major theme of the 'recruiting rule' is not 'initial contact' The major theme is 'exceeding what is normal and appropriate.' Initial contact can be a violation, but is only one of many things that can exceed what is normal and appropriate."

49. Under TSSAA By-laws, Brentwood Academy was permitted to present an initial appeal on August 13, 1997, and a subsequent appeal to the entire Board of Control on August 23, 1997.

50. As a result of Brentwood Academy's appeals, the sanctions which Ronnie Carter imposed in his preliminary decision of July 29, 1997 were changed.

51. At the time of the meeting on February 10, 1993, and the letter of February 24, 1993, Brentwood Academy Headmaster Bill Brown and Athletic Director Carlton Flatt possessed or had ready access to a copy of the then-current TSSAA By-laws as set forth in the TSSAA Handbook.

52. At the time of the meeting on February 10, 1993, and the letter of February 24, 1993, the Guidelines for understanding the "recruiting rule" appeared in the TSSAA Handbook as a part of the TSSAA By-Laws, and the first of those Guidelines stated:

> "The major theme of the 'recruiting rule' is not 'initial contact.' The major theme is 'exceeding what is normal and appropriate.' Initial contact can be a violation, but is only one of many things that can exceed what is normal and appropriate."

53. Carlton Flatt received a copy of Ronnie Carter's January 15, 1992 letter to Brentwood Academy Headmaster Bill Brown.

54. TSSAA's first version of the "recruiting rule" was adopted in 1935, and the rule in all its amended forms since 1935 has prohibited "the use of undue influence."

55 On or about May 30, 1997, Carlton Flatt informed

TSSAA that John Patton coached Brentwood Academy's middle school boys basketball team and used the Brentwood Academy gym for an AAU basketball team that included several of Brentwood Academy's players.

56. Typically, Brentwood Academy has 8 to 12 new 9th-12th grade students participating in interscholastic football at the beginning of fall football practice.

57. In 1995, no students enrolled at other schools attended spring football practice at Brentwood Academy. In 1996, one or two students enrolled at other schools attended spring football practice at Brentwood Academy. In 1997, twelve students enrolled in the eighth grade at other schools attended varsity spring football practice at Brentwood Academy.

Respectfully submitted,

/s/

G. Thomas Nebel (BPR #5206)
501 Union Street, Ste. 504
Nashville, Tennessee 37219
(615) 244-4700

/s/

H. Lee Barfield, II (BPR #2581)
W. Scott Sims (BPR #17563)
Bass, Berry & Sims, PLC
2700 First American Center
Nashville, Tennessee 37238
(615) 742-6202

Attorneys for Plaintiff

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

BRENTWOOD ACADEMY, Plaintiff, v. TENNESSEE SECONDARY SCHOOLS ATHLETIC ASSOCIATION and RONNIE CARTER, Executive Director and Individually, Defendants.	)	No: 3-97- 249 Judge Campbell Magistrate Judge Haynes

AFFIDAVIT OF JEROME V. SAILORS

Jerome V. Sailors, being first duly sworn, upon his oath deposes and says:

1. My name is Jerome V. Sailors and I am the Executive Director of the State Board of Education of the State of Tennessee and my office is located on the 9th Floor of the Andrew Johnson Tower, 710 James Robertson Parkway, Nashville, Tennessee 37219. I was appointed as Executive Director in January 1996 and assumed my position in April 1996. Before January 1996, I served as Superintendent of the Anderson County, Tennessee School System for seven years.

2. The minutes of the State Board of Education indicate that on August 25, 1972, the State Board of Education adopted the following resolution regarding the Tennessee Secondary School Athletic Association:

RESOLUTION

"WHEREAS, the State Board of Education by deference has recognized since 1925 the functions of the Tennessee Secondary School Association in providing standards, rules and regulations for interscholastic competition in the public schools of Tennessee:

NOW, THEREFORE, BE IT RESOLVED, That the Tennessee State Board of Education recognizes and designates the Tennessee Secondary School Athletic Association as the organization to supervise and regulate the athletic activities in which the public junior and senior high schools of Tennessee participate in on an interscholastic basis. (Junior High Schools must include grade 9 in order to qualify for membership.) The authority granted herein shall remain in effect until revoked.

BE IT FURTHER RESOLVED, That the State Board of Education approves the current rules and regulations as stated in the 1972-73 official handbook of the Tennessee Secondary School Athletic Association and reserves the right to review the appropriateness of any future changes; and

BE IT FURTHER RESOLVED, That the Chairman of the Tennessee State Board of Education shall designate a person or persons to serve in an ex-officio capacity of the Tennessee Secondary School Athletic Association Board of Control and Legislative Council".

The minutes of the State Board of Education indicate that this resolution was unanimously adopted. A copy of the minutes of the August 25, 1972 meeting are attached.

3. I am also attaching a copy of the current regulation of the State Board of Education regarding TSSAA. Rule 0520-1-2-.08 **Interscholastic Athletics** provides:

> (1) The State Board of Education recognizes the value of participating in interscholastic athletics and the role of the Tennessee Secondary School Athletic Association in coordinating interscholastic athletic competition. The State Board of Education authorizes

the public schools of the state to voluntarily maintain membership in the Tennessee Secondary School Athletic Association."

The latest revision to this rule was filed on October 31, 1995, effective February 28, 1996. The authority of the Tennessee State Board of Education as authorized by the Tennessee General Assembly is set forth in § 49-1-301 9 et. seq. Tenn. Code Ann. At no point in § 49-1-302 is there any reference to the authority of the State Board of Education to set policies for interscholastic athletics or extra-curricular activities. Apparently, the State Board assumed the responsibility in 1972 when it fret addressed this matter but, in my judgment, there is no statutory authority granted to the State Board of Education to recognize, designate, or authorize the Tennessee Secondary School Athletic Association to take any action relevant to coordinating or regulating interscholastic athletic competition in the state of Tennessee.

4. The State Board of Education does not in any way approve or disapprove or act upon any of the TSSAA rules and regulations regarding the regulation of athletic competition between member schools. TSSAA does not submit to the State Board of Education for approval of its rules and regulations nor does the State Board of Education approve, consider, or disapprove the salaries for the Executive Director, the Associate Executive Directors or the staff members of the TSSAA. As far as I know, TSSAA has the authority to purchase real property, buy and sell property, mortgage or encumber property and execute promissory notes, deeds of trust, or mortgages without any approval or consideration by the State Board of Education. Likewise, TSSAA does not submit to nor does the State Board of Education approve any budget of any type for TSSAA's operations. TSSAA does not receive any tax revenues from the State of Tennessee, the State Board of Education, or the Department of Education Likewise, no

member of the State Board of Education attends meetings either of the TSSAA Board of Control or Legislative Council. Any public high school in Tennessee is free to join or refrain from joining TSSAA.

FURTHER AFFIANT SAITH NOT.

/s/ Jerome V. Sailors
Jerome V. Sailors

Sworn to and subscribed before
me this 26th day of June, 1998.

/s/ Phyllis E. Childress

My Commission Expires: January 29, 2000

[Certificate of Service omitted in printing.]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

BRENTWOOD ACADEMY, Plaintiff, v. TENNESSEE SECONDARY SCHOOLS ATHLETIC ASSOCIATION and RONNIE CARTER, Executive Director and Individually, Defendants.	)	No: 3-97- 249 Judge Campbell Magistrate Judge Haynes

AFFIDAVIT OF RONNIE CARTER

Ronnie Carter, being first duly sworn, upon his oath deposes and says:

1. My name is Ronnie Carter and I reside at 1544 McMahon Hollow Road, Pleasantview, Tennessee. I am the Executive Director of the Tennessee Secondary School Athletic Association ("TSSAA") and have served in this capacity since 1986. I am elected by the members of the Board of Control of TSSAA for a term of three years and my duties are set forth in Article V of the Constitution of TSSAA.

2. Attached is a compilation which I have made of the history of the TSSAA Recruiting Rule, contained in the Constitution and By Laws of the TSSAA, as set forth in the TSSAA's handbook. The guidelines for interpreting the Recruiting Rule were developed and promulgated by the Legislative Council in 1992. The Committee which drafted the guidelines included Jim Phifer, Principal of Notre Dame School, a parochial school in Chattanooga.

3. The revenues of TSSAA are derived from State tournaments and championship playoffs. TSSAA receives no funds from any regular season interscholastic contests between member schools, regardless of the sport or the location of the event. During the 1997-98 school year, the membership dues paid to TSSAA by its member schools, whether public, private or parochial, amounted to approximately $70,000.00. During the same period, TSSAA received from total revenues of 1.6 million dollars, the majority of which come from gate receipts of tournaments and playoffs.

4. I have prepared a tabulation of the sites of post-season playoff and tournament events for sports which TSSAA sanctions, golf, soccer, volleyball, cross-country, football, basketball, wrestling, baseball, softball, tennis and track, for the school years 1995-96, 1996-97, and 1997-98. The tabulation for all of these secondary school athletic contests for the three academic years is as follows:

1995-96
Public Sites 300 Private Sites 74
1996-97
Public Sites 301 Private Sites 89
1997-98
Public Sites 225 Private Sites 52

For the three year period, of the 1,071 post-season, championship and playoff events, 827 were conducted at public facilities and 244 were held at private or parochial schools. Thus, 28 percent of the post-season tournament games were held at the facilities of private or parochial member schools. At the district and regional levels of post-season tournament and playoff competition, the member schools select their own tournament sites. TSSAA has no involvement in the selection of these sites.

5. Where TSSAA utilizes public facilities, stadiums, gyms or grounds, government owned and utilized for state tournament play or playoffs, such as the Murphy Center on

the campus of Middle Tennessee State University at Murfreesboro, (where TSSAA conducts its state basketball championships) TSSAA is required to enter into a written agreement with MTSU in order to be able to use the facility. Under this Agreement, TSSAA is required to register with the Sales Tax Division of the Tennessee Department of Revenue and must pay all applicable amusement sales taxes. Also, TSSAA must furnish proof of insurance, as required by the policies of the State Board of Regents of the university and community college system of Tennessee for private used or the facility. Furthermore, TSSAA must agree to indemnify and hold MTSU harmless from all liabilities arising out of the use of the Murphy Center. For the "Spring Fling", the state championship tournaments in spring sports, i.d. track etc., TSSAA takes the bids from cities wishing to host the event and the host city provides, in its bid, that the sites for the tournament event or playoff.

FURTHER AFFIANT SAITH NOT.

/s/ Ronnie Carter
Ronnie Carter

STATE OF TENNESSEE)
COUNTY OF DAVIDSON)

Sworn to and subscribed
before me, this 29th day of June, 1998.

/s/ Tammy Swann
Notary Public

My Commission Expires: 5/27/2001

[Exhibit A]

HISTORY OF THE "RECRUITING RULE"

In 1925, the Tennessee Secondary School Athletic Association was formed.

In 1935, the first recruiting rule was developed and it stated:

> "The use of undue influence by anyone in causing a student to transfer from one school to another for athletic purposes shall render the student ineligible for twelve months, and the school shall be penalized."

In 1951, the phrase . . . "or attempting to cause" was added, making the recruiting rule read:

> "The use of undue influence by anyone in causing, or attempting to cause, a student to transfer from one school to another for athletic purposes shall render the student ineligible for twelve months, and the school shall be penalized."

In 1958-59, the recruiting rule was changed to read:

> "The use of undue influence by any person connected, or not connected, with the school to secure or to retain a student or the parents or guardians of a student for athletic purposes may cause the student to become ineligible and will make the school subject to penalty "

In 1984-85, the phrase "with or without an athletic record" was added, making the rule read:

> "The use of undue influence on a student (with or without an athletic record), his parents or guardians of a student by any person connected, or not connected,

with the school to secure or retain a student for athletic purposes shall be a violation of the recruiting rule."

The Questions and Answers of the recruiting rule were also added:

Q. What is the penalty for violation of the recruiting rule?

A. Violation of the recruiting rule shall use the student to be ineligible at the school in violation, and a penalty shall be placed against the school.

Q. Is it permissible for a coach or teacher to transport an athlete to or from school?

A. No. A coach or teacher who transports an athlete to or from school will cause the athlete to become ineligible and the school will be subject to penalty.

Q. Is it permissible for a coach to contact a student or his parents prior to his enrollment in the school?

A. No, a coach may not contact a student or his parents prior to his enrollment in the school. This shall apply to all students whether or not they have an athletic record.

Q. How is undue influence interpreted in the recruiting rule?

A. A person or persons exceeding what is appropriate or normal and offering an incentive or inducement to a student with or without an athletic record.

In March of 1990, the Legislative Council made a decision regarding the rule and decided the following:

"That a committee consisting of Bill Stanfield, Gordon Perry, Jim Phifer, and members of the TSSAA staff meet to strengthen the interpretations regarding 'undue influence' under the recruiting rule and strengthen the interpretation made in the questions and answers section regarding this area, and also to look at the entire transfer rule."

In 1990-91, two new questions were added:

Q. What are some of the guides used in determining whether there has been undue influence used which would result in a violation of the recruiting rule?

A. Some examples are, but not limited to:

1. Providing of transportation or other inducement to any prospective student/athlete to take a qualifying examination at school, meet with school officials, etc.

2. Discussion of financial aid based on need with any prospective student/athlete by any member of the coaching staff until the student has enrolled in school (attended 3 days of school). All financial aid questions should be referred to the principal or the person in charge of financial aid. If the person in charge of financial aid is a coach, prior approval must be granted by the Executive Director of TSSAA.

3. Any initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/athlete enrolled in any member school except where there is a definite feeder pattern.

4. Any initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/athlete in the seventh grade and above at any non-member school except where there is a definite feeder pattern involving the schools.

Public high schools may contact public feeder schools (elementary, middle school, junior high school) where there is a definite feeder pattern. Private or parochial schools may contact private schools (elementary, middle school, junior high school) where there is a definite

feeder pattern.

Private or parochial schools may not contact students enrolled at the public schools. Public schools may not contact students enrolled at the private schools.

5. Any contact between a member of the coaching staff or representative of the school and prospective student/athletes prior to, during, or after contests at elementary schools, middle schools, and junior high schools except where there is a definite feeder pattern.

6. A member school is prohibited from giving party item with school advertisement (shirts, pennants, caps, jackets, etc.)

7. Admitting students to athletic contests free of charge where there is an admission being charged at the contest except where there is a definite feeder pattern involved with the school.

Q What is allowed by members schools in contacting prospective students?

A. A representative of the school may meet with students at a school that is defined as a feeder school or meet with students who are zoned to attend that school the following year. This visit must be cleared by the principals of both schools.

In 1992-93, the "Guidelines for Understanding the 'Recruiting Rule' and Understanding 'What's Undue Influence?'" was added. It reads:

1. The major theme of the "recruiting rule" is not "initial contact." The major theme is "exceeding what is normal and appropriate." Initial contact can be a violation, but is only one of many things that can exceed what is normal and appropriate.

2. One key is not treating "athletes" or "prospective athletes" any differently than students who are not athletes.

3. Students should be seen as students and not singled out based on their potential athletic ability.

4. Pre-arranged contact is seen in the same manner as initial contact.

5. Any student or family or individual that contacts a coach about attending a school where he or she should be informed that they need to contact the principal, admissions department, or guidance department if they have an interest.

6. Any meeting with coaches regarding athletes or prospective athletes or their families should be at the request of the family to the individual(s) responsible for admissions and should take place at the school.

7. High school athletics is not the same as colleges recruiting high school athletes for college athletics. High school athletics exist for an entirely different reason. High school coaches should not view 12, 13, 14 year-old students in the same manner as college coaches view high school seniors.

8. Administrators and coaches must realize that they have more responsibilities than the general public to understand the purpose of high school athletics, the principles behind the TSSAA rules etc., and to maintain a level of understanding and purpose when dealing with the general public and students.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

BRENTWOOD ACADEMY, Plaintiff, v. TENNESSEE SECONDARY SCHOOLS ATHLETIC ASSOCIATION and RONNIE CARTER, Executive Director and Individually, Defendants.	)	NO: 3-97-249 JUDGE CAMPBELL MAG. JUDGE HAYNES

SECOND AFFIDAVIT OF MELNA VAN BEBER

Melna Van Beber, first being duly sworn according to law, states as follows:

(1) I am a paralegal employed by the law firm of Bass, Berry & Sims PLC, which represents plaintiff Brentwood Academy in this matter. I have held that position since 1996.

(2) I have personal knowledge of the facts contained in this affidavit and they are true, correct and accurate to the best of my knowledge, information and belief.

(3) At the direction of attorney Lee Barfield, I have attempted to ascertain whether all of the public high schools in Tennessee are members of the TSSAA. I was unable to identify any person who could answer this question directly or, any document setting forth the answer directly. Accordingly, I obtained a comprehensive listing of all of the public schools in the state from the Tennessee Department of Education. From that list, I determined that there are 295 public high schools in the state. I then reviewed the TSSAA's current membership roster to determine how

many of these 295 schools are members of the TSSAA. I ultimately determined that all 295 public high schools are members of the TSSAA.

(4) The foregoing conclusion is based upon the best evidence available to Brentwood Academy at this time, and I believe my analysis to be true and accurate.

(5) I have reviewed the Second Affidavit of Ronnie Carter, which was filed with the Court on July 22, 1998. During the course of my investigation, I contacted a number of the schools that Mr. Carter's affidavit identifies as non-TSSAA members, such as Harris-Hillman Special Education School, Weakley County Regional High School and Daniel McKee Alternative School. Those schools were not included on my list of potential TSSAA members because they do not have interscholastic sports programs.

FURTHER AFFIANT SAITH NOT.

/s/ Melva Van Beber
Melva Van Beber

STATE OF TENNESSEE)
COUNTY OF DAVIDSON)

Sworn to before me this 14th day of July, 1998

/s/ Karen Reecer
Notary Public

My Commission Expires:
July 22, 2000

[Certificate of Service omitted in printing.]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

BRENTWOOD ACADEMY, Plaintiff, v. TENNESSEE SECONDARY SCHOOLS ATHLETIC ASSOCIATION and RONNIE CARTER, Executive Director and Individually, Defendants.	)	No: 3-97- 249 Judge Campbell Magistrate Judge Haynes

DEFENDANTS' RESPONSES TO PLAINTIFF'S FIRST REQUESTS FOR ADMISSION

* * *

1. Admit that, as adults, the parent(s) of a secondary school student-athlete are not susceptible to "undue influence" and/or exploitation by secondary school representatives.

RESPONSE: The defendants object to this request on the grounds that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. In Brentwood Academy v. TSSAA, 262 F.3d 543 (6th Cir. 2001), the Sixth Circuit remanded the case for an evaluation of TSSAA's "exploitation" and "level playing field" interests after TSSAA has had the opportunity to present whatever support it deems appropriate to justify its position. After the District Court decides if either or both of those interests are legitimate, it is then to apply those interests, along with TSSAA's recognized interest in keeping high school athletics in their proper place, to

the alleged recruiting rule violations that TSSAA enforced against Brentwood Academy in this case. The Sixth Circuit noted that TSSAA should be given the opportunity to present whatever support it deems appropriate to justify the need for the regulations on recruiting, but cautioned the parties to then stay focused on the two alleged recruiting rule violations in question rather than engage in a wide ranging attack or defense of the recruiting rule as a whole. Id. at 558. The recruiting rule violations in question involve letters mailed to, and telephone calls made to, eighth grade students, along with free admission of eighth grade students to athletic contests. The plaintiff's request pertains to hypothetical circumstances not at issue on remand, representing a patent and deliberate intent to ignore the Sixth Circuit's cautionary instructions and to instead engage in a wide-ranging facial attack on the recruiting rule, contrary to the law of the case.

* * *

12. Admit that the Recruiting Rule does not prohibit a public/private/parochial school from using undue influence to secure or retain a student for non-athletic purposes.

RESPONSE: The defendants adopt and incorporate by reference their objection to request number 1. Without waiving this objection, the defendants acknowledge that the TSSAA recruiting rule only regulates recruiting for athletic purposes. It does not in any way limit any member school in its efforts to recruit students for reasons unrelated to athletics. TSSAA only regulates the interscholastic athletic relations of its member schools, and only to the extent that the member schools have collectively and democratically agreed to such regulation. To the extent that the assertion in this request is consistent with this explanation, it is admitted.

* * *

66. Admit that, at the time the Recruiting Rule was initially adopted, the TSSAA did not have evidence that student-athletes were being treated differently by school officials than other students.

RESPONSE: The defendants adopt and incorporate by reference their objection to request number 34.

67. Admit that, at the present time, the TSSAA does not have evidence that student-athletes are being treated differently by school officials than other students.

RESPONSE: The defendants adopt and incorporate by reference their objection to request number 30. Without waiving this objection, the request is denied.

* * *

72. Admit that the Recruiting Rule does not define "undue influence."

RESPONSE: The defendants adopt and incorporate by reference their objection to request numbers 1 and 3.

73. Admit that the Recruiting Rule does not define "what is normal and appropriate."

RESPONSE: The defendants adopt and incorporate by reference their objection to request numbers 1 and 3.

/s/ Richard L. Colbert
Richard L. Colbert
COLBERT & WINSTEAD, P.C.
1812 Broadway
Nashville, TN 37203
(615) 321-0555

Attorney for Defendants

[Certificate of service omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

BRENTWOOD ACADEMY, Plaintiff, v. TENNESSEE SECONDARY SCHOOLS ATHLETIC ASSOCIATION and RONNIE CARTER, Executive Director and Individually, Defendants.	)	No: 3-97-1249 Judge Campbell Magistrate Judge Griffin

DEFENDANTS' THIRD SUPPLEMENTAL RESPONSES TO PLAINTIFF'S SECOND SET OF INTERROGATORIES

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Request No. 66: Defendants renew and incorporate their original objections to Request number 66 as it relates to Interrogatory number 1. Defendants also object to this Request on grounds that the application of intermediate scrutiny in an "as applied" analysis does not require that defendants provide empirical or factual evidence to support the adoption of the recruiting rule.

In accordance with the Magistrate Judge's ruling, Defendants respond by stating that they lack knowledge or information sufficient to adequately respond to this request because the drafters of the original recruiting rule that was adopted in or around 1930 are dead, and no written legislative history is known to exist for the rule.

Request No. 67: Defendants renew and incorporate their original objections to Request number 67 as it relates to Interrogatory number 1. Without waiving such objection, Defendants deny this request. In accordance with the Magistrate Judge's ruling, Defendants state that they rely solely on the facts and empirical evidence upon which Defendants' experts relied. Other than anecdotal evidence that plainly demonstrates that interscholastic student-athletes are often treated differently than other students, there are no additional facts or empirical evidence that Defendants presently rely on to support their denial of Plaintiff's request.

Request No. 72: Defendants renew and incorporate their original objection to Request number 72 as it relates to Interrogatory number 1. In accordance with the Magistrate Judge's ruling, Defendants respond by admitting that the recruiting rule itself does not define undue influence, although the interpretive commentary explains to high school administrators and coaches what constitutes undue influence. In addition, the interpretive commentary specifically identified the actions of Brentwood Academy at issue in this case, namely free admission to a football game and coaches initiating contact with student-athletes who were not yet enrolled at Brentwood Academy, as examples of conduct that would be regarded as undue influence.

Request No. 73: Defendants renew and incorporate their original objection to Request number 73 as it relates to Interrogatory number 1. In accordance with the Magistrate Judge's ruling, Defendants respond by admitting that the recruiting rule itself does not define what is normal and appropriate. The rule itself does not use the phrase "normal and appropriate." That phrase is found in once sentence of the two pages of interpretive

commentary accompanying the rule. In addition, when considered in the context of educational athletics and the interests of member schools that are served by TSSAA as well as in the context of the overall interpretive commentary that accompanies the rule, rather than in isolation and without regard to the surrounding circumstances, the high school coaches and administrators who are expected to comply with the rule can reasonably ascertain what is meant by the phrase. In case there are any doubts about whether a particular act is or is not "normal and appropriate," TSSA officials are on hand on a daily basis to discuss particular circumstances with coaches and administrators.

* * *

8. Does TSSAA contend that the Recruiting Rule is necessary to prevent the exploitation of student-athletes in Tennessee? If so, explain in detail the factual or empirical support for any such contention.

THIRD SUPPLEMENTAL RESPONSE: In accordance with the Magistrate's ruling, Defendants respond by stating that preventing the exertion of undue influence for athletic purposes, whether by this particular rule or by some other means, is necessary to prevent the exploitation of student-athletes. In support thereof, Defendants refer Plaintiff to the facts and empirical evidence relied upon by Defendants' experts as stated in Defendants' expert witness statements. Anecdotal evidence also demonstrates the need to prohibit the use of undue influence to secure the athletic services of interscholastic student-athletes. As Defendants stated in their third supplemental response to Request number 66 as it relates to Interrogatory number 1, Defendants do not possess either factual or empirical support for the adoption of the recruiting rule

since the drafters of the rule are dead and no there is no known written legislative history for the rule.

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

[Caption Omitted in Printing]

TRANSCRIPT OF PROCEEDINGS – BENCH TRIAL

VOLUME I of Ten

BEFORE THE HON. TODD J. CAMPBELL,
U. S. District Judge

on December 11, 2002

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[Testimony of Carlton Flatt]

[134]

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Q. * * * Do you recall at the final hearing, Music City Sheraton in Nashville, whether or not Brentwood Academy offered to call Bart King?

A. Yes, sir.

Q. Was he called?

A. No, sir.

Q. Why not?

A. Mr. Carter said he didn't want him to. Said, Would y'all like to talk to Bart King? Mr. Carter said, No.

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[146]

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BY MR. COLBERT:

Q. Now, Coach Flatt, I passed you what's been marked as Defendants' Exhibit 73. You recognize that letter from Bill Brown to Ronnie Carter?

A. Yes, sir.

Q. And did you assist in the preparation of this --

A. Yes, sir.

Q. -- letter?

A. Yes, sir.

Q. Okay. And this was Brentwood Academy's response to these allegations and this information that Mr. Carter had passed along with his July 3rd memo, right?

A. Right.

Q. Okay. So is it -- wouldn't it be fair to say that, as these two pieces of correspondence reflect, Brentwood Academy had a pretty good idea what the allegations were against it as of that time?

A. Well, we had a pretty good idea of the possible -- some of the possible allegations, yes, sir.

Q. Okay. Enough of an idea to do a ten-page detailed response, right?

A. Well, we were trying to answer the allegations.

Q. Okay. And this was the correspondence where Brentwood Academy wound up supplying to TSSAA what we are all now referring to as the spring practice letter, right?

A. Yes. We sent that, yes. Right.

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Q. Now as a coach who coaches kids, high school kids, you understand, do you not, Coach Flatt, that if a coach tells a player, I think this would be your advantage, young man, the player's not going to think that's optional, is he?

A. In some cases.

Q. Player's going to look at that and think if I want to play for this coach I guess I better do it?

A. I sure hope they didn't feel that way.

Q. You actually got calls from a couple parents and they did feel that way, didn't they?

A. And I tried to correct it by calling everybody back. What I wanted to correct, not coming to practice was that they were not fulfilling what they should do at their other school.

Q. All right.

A. That was the problem.

Q. All right. And when you got these calls, I think you said, Whoa, I've got a problem here?

A. Right.

Q. Because you realized the effect your letter was having on them, right?

A. No, I realized they had not gone by my letter.

Q. You realized the effect your letter was having is that they felt like they might even need to miss a track meet to come to spring practice?

A. Right.

Q. A track meet at the school they were attending to come to spring practice at a school they weren't attending?

A. Right.

Q. That was the effect your letter was having on them?

A. On?

Q. The ones that come?

A. The ones that come, right. Could have had the effect on all of them, I don't know. But I tried to correct that.

Q. All right. All right. And you worried about what the middle school coaches would think, right?

A. Right.

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Q. All right. Going briefly to the issue of the investigation and so forth, let me ask you one very specific

question to be sure the record's clear on this.

To your knowledge, did the TSSAA ever, ever give Brentwood Academy a list, a written list of accusations of Section 21 violations against it before Mr. Carter sent out his June -- July 29th finding of violations?

A. Well, we received from Mr. Carter information of allegations. You know, I was reading the stuff and supposedly this Mr. King had promised them cars and given them diamonds and everything. I mean he put those down as allegations.

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

[Caption Omitted in Printing]

TRANSCRIPT OF PROCEEDINGS – BENCH TRIAL

VOLUME II of Ten

BEFORE THE HON. TODD J. CAMPBELL,
U. S. District Judge

on December 12, 2002

* * *

[Testimony of Ellen Goldring]

[329]

* * *

Q. Now the parents' decision about which of these schools is best for their child that you talked about, is information on choices important or not?

A. The flow of information is the most important -- one of the most important or the most important reasons that parents can make good choices.

Q. Why is that? **[330]**

A. Education is a complicated business and it's a very important decision. And obviously you can't make -- or families can make good decisions about the best fit, what their child needs and where their child can be most successful if they don't have access to good information. That's number one.

Number two, I don't think we realize the majority of us sitting in this court, we're middle class, upper middle class, I

don't think we understand the extent to which we have access to information through our social networks and social capital. Therefore, if we want to provide access and equity to all children to avail themselves of the choices that are there, and they are there, it is our school districts' responsibilities to provide as much information as possible in as many avenues as possible and through as many channels as possible so parents can know about the choices, can make informed decisions and then can exercise their choice option if they choose to do so.

* * *

Q. * * * What is social networking?

A. We -- typically people move in what we call social **[331]** networks, it's a sociological term. So, you know, people from work who're in the same social class where you work, you know, people in your neighborhood who live in the same social milieu that you live in. We have access to people who know people at different types of schools. So you know about the system. That's called the social network.

Friends, family, kin, who we talk to, where we frequent, places where we frequent, people that you bump into.

Unfortunately, in this country lower socio people are highly isolated either because they are unemployed, because of housing patterns, or because of the way in which -- the chaotic way in which they may be working. If you don't have a car and you're riding on a bus for one and a half hours to get to your place of employment is an example.

So for us, we are attuned to when we make the choice of school, it's in our milieu already. I bet everyone of us knows, oh, when my son turns to be a kindergardener I need to consider should I go to public school, what is the nature of my private school? Who do I know who's going to different private schools? We think about that. We talk to people. We do it all the time. Every time there is a transition in the

ages of our school children, it's part of our milieu. Sometimes it's so much a part of our milieu, I don't know, it makes me very nervous, **[332]** this is a matter you start thinking about it, talking about it.

Now if you're in a milieu where no one is thinking about choosing a school, it's not part of what you've ever done. You don't know anyone who went to a magnet school, you don't frequent private schools. You don't know anyone who ever went to a private school. You therefore need a way to be brought into the decision making process.

When we -- our study on magnet school, one magnet school, one parent who didn't exercise choice, and this was in a district that had 50 percent of the schools were magnet schools, and we asked her why didn't she, and she said, this is pretty much a quote, If you're not in the market for a used car, you're not going to look at the classified ads.

So if you're not in the framework that you're looking to choose a school, then you don't think about it.

So unless you have some social network, social milieu, it's incumbent. If we're serious about equal opportunities for people to make choices, and if we're serious about diversity in our schools, socioeconomic diversity, racial diversity, we need to think about other ways to share information because it is not natural to everyone the same way it's natural to us.

Q. Did you -- where did you learn this information about the difference between and the importance of social **[333]** networking and the differences between lower socioeconomic and higher socioeconomic status?

A. In our studies of St. Louis and Cincinnati we interviewed parents, we surveyed hundreds and hundreds and hundreds of parents through both magnet schools and non-magnet schools, and in Nashville we're similarly doing -- getting ready to do a similar study, and we are piloting a survey and, in fact, we just piloted a telephone survey last week and we asked low income parents about the magnet schools and they have looked at me and they said, Magnet

schools, aren't those private schools?

We take a lot for granted. That's the important point I think we need to make clear.

Q. Based on your research, Professor, what do parents look for in choosing a school? What are the key factors?

A. The key factor that parents state is reputation of the school, academic reputation of the school, overall reputation of the school. They talk about a safe, secure, orderly environment where discipline is upheld, they talk about, quote-unquote, good teachers and good students. A general sense that it is a good school.

When you put down what good means, they then begin to articulate those other things, safety, teachers, discipline, academic requirements, et cetera.

Q. What about athletics? How does athletics rank as a **[334]** factor?

A. In the Gallup Poll that was asked, it ranked lower, and I can't recall the exact numbers, but I think only 34 percent said it was highly important, and this compares to about 80 or 90 percent of parents who mention academics, teaching, safety and things like that.

Q. Going back to the lower socioeconomic group that you have discussed in your research a little bit, why do they not have the social networks that you talk about? Why are they --

A. As I mentioned before, they are in a different milieu. So if they are in a milieu where no one neighborhood, a milieu is a neighborhood context place of work, so if they are in a milieu that has never accessed choice before, they don't know anyone who went to a private school, they may not know that there are scholarship opportunities, how would I get there, could my son ever get in. And it's hard to articulate this. But many poor families are grappling with day to day issues that again I sometimes think that we don't have an inkling into their lives.

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[341]

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Q. All right. Let's move to soliciting students for just a minute. You mentioned that the right match for school and student is the key, and it's the parents' choice.

Do successful school choice programs depend in any way on recruiting soliciting students?

A. All of them do. And we don't ever use the word [342] soliciting. We would use the word recruiting in the educational arena. Schools that don't have attendance zones have to get their students by recruitment. Even though some schools are so popular like, let's say, Hume-Fogg, they may say, Oh, we can rest on our laurels and we know enough students are going to fill up that magnet school application and come to us, but given that I think universally and I guess the Supreme Court's going to tell us if diversity is now a public interest, I think educationally we all believe that diversity is a very, very important interest and when we say diversity we mean diversity in a number of arenas.

And so recruiting is important because if you just accept the person who comes to you, that may not be the student body that you want. So it's important, you know, when we think about school choice, there is a funnel, you think in terms of a funnel. And in one of my papers I write about this funnel. And when we think about school choice we have to remember that there are many parents, we call them non-active choosers, meaning they may have gone to get a lot of information about schools, they may have spoken to formal and informal school officials or friends or colleagues, and they may have chosen to remain in their public school. Well, they don't come up in any roster of people who made a school choice because they are in their zoned school and there's no way to count them unless, like we did, we [343] surveyed them and we went to the public schools and we were surprised because we said, Did you

ever consider school choice? You know, What information did you look at? And we found there's quite a large percent of parents who're in the choice arena but we can't count them.

But as a school, the recruiting is important so we arrive at enough interest, you can't enroll students unless they first apply and you want that initial funnel, the application pool to be as rich and diverse and a match as possible.

Q. Is it important to the magnet schools? Is recruitment important to magnet schools?

A. Absolutely.

Q. What about not just the zoned public schools? Is recruitment important to officials there?

A. Well, it's becoming more so because of concerns about, without having racial court-ordered desegregation, it's a big concern because our schools are, in Nashville, are resegregating. Some of them. And so the way in which to present that both for the magnet schools and for the zoned schools is to try to encourage your zone, which some of the zones are racially integrated, that they don't go out of balance by having people either all go to magnet schools or all go to private schools. And that diversity is certainly an educational interest. **[344]**

Q. You're familiar and you reviewed the metro -- metro school strategic plan --

A. Correct.

Q. -- in connection with your testimony here.

Does metro have any plans to attract, to recruit, if you will, private school students back to the public system?

A. Yes, it is one of the stated strategicals of the current board to, and I don't recall the language, but to recruit or, attract back private schools -- private school students into the public schools.

Q. Now is that -- do you remember the number of students that is in the five-year plan?

A. No. There's a target and I don't recall it.

Q. We'll get to it a little bit later.

Is that good or bad? I mean, the fact that metro is attempting to recruit students from the private schools back to the public program, is that good or bad from an educational policy perspective?

A. Again, my perspective is we should care about what's good for kids. And we shouldn't be social engineering for anyone where they are going or where they can't go. So if metro wants to open their doors and tell their story and entice parents, ultimately based on their, quote-unquote, product, parents will decide whether they want to change **[345]** schools or they don't. I don't think it's inherently good or bad, until we know whether it's a good match.

Q. Okay. Do you know how schools tell their stories generally?

A. Yes.

* * *

Q. What about the in person, the face to face contact, in telling the stories? Is that prevalent and is it important?

A. I think it's crucial because ultimately parents need to know what they're getting into in any school they go to. They need to know what their choice options will be within a **[346]** school when they get to that school and I think that's an important point. We're not only choosing a school and then it's a school, but when you get inside that school, there's choices, especially in high school, all along the way.

So you need to know, number one, what courses are available as your child proceeds through the school.

Number two, you need to know what the expectations are. I can use a lot of personal examples in this as we're making choices for both of our children. I wanted to speak to a lot of people in the school one on one to make sure that I knew to the best of my ability what the school's perspective was about a number of things. And also whether that would fit the needs of my children.

Now obviously I'm a very informed consumer and I could ask probably questions that the typical parent may not ask, but even more so why we need educators involved, in my opinion, in these types of issues, meetings with anyone really, including athletics, is important. Because if it's not for my kid, the expectations on athletics I would want to know on the front end.

Q. What about the lower socioeconomic, lower S-E-S groups, is personal communications important to them, if so, why?

A. It needs to be equally important so again they can make informed decisions about what it is their child needs and can gain from a school. **[347]**

I'll give one example. When we went to the first open house at MLK, the first thing, MLK starts at seventh grade, and the first thing the guidance counselor got up and said is, you know, At this school your child will receive two to three hours of homework a night. That's an example. If that's not something that either you think your child can sustain or you as a family can try to support that type of commitment, you know, come talk to us. Let's see if this is a match. And this is a public school. So the more information on the front end, the better, in my opinion, everyone will be as they go through.

Q. How important is it a targeted contact, identifying a particular child or a particular family, to tell them the story?

A. Schools, you know, have different legitimate needs, and I think if diversity is an interest of a school and excellence is an interest of a school, I don't see any problem with that. So if there are, you know, the three students in the science fair who won and their names are in the paper and, you know, a school wants to pride themselves on having the best science program and thinks that's good for the child and the school, I don't see any downside to that as long as you know the parents are involved and educators are involved in the decision.

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[427]

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Q. Ms. Brasher, let me ask you, the spring practice letter, why choose a letter to send this information out to the parents? Why not send it by some other method of communication? Why was a letter chosen?

A. Well, that was I guess the day before e-mail. Now I [428] guess I would e-mail people those things. Even though a lot of families still don't have that, because it's the best way to communicate with them. I mean if you send a letter, you know you have sent it and you're assuming they have received it.

Q. What about telephone calls to parents? Why make telephone calls to parents about information, school information, rather than communicating some other way?

A. Well, because I mean I'm a parent, I want people calling me telling me what my kids can do and what they can't do and what they are involved in. I want personal contact. And in admissions we want families to have a personal contact with people at our school, besides the admissions director.

Q. Was it practical at Brentwood Academy in 1996 and 1997 to put the information concerning the dates of spring practice in the admissions or the applications packet that families would pick up in the fall?

A. No.

Q. Why not?

A. Well, because Coach Flatt wouldn't have known when they were. But we have a planned way of communicating with families. The admission packet that we send basically tells families about our mission, our vision, it's a large picture about the school. And we break it down into smaller details, so by the time spring practice comes along,

it's a [429] very detailed piece of information that -- it would serve no purpose going any earlier than right before spring practice.

Q. What about putting that information in an acceptance packet of information that goes out to the parents when the student is accepted?

A. A spring practice letter?

Q. A spring practice letter.

A. Send it in an acceptance packet?

Q. Is that practical?

A. No.

Q. What about communicating through real estate agents? The information about spring practice, is that a reasonable way to communicate information about dates of spring practice?

A. I guess if they were moving into town maybe. But no. There are only however many we send, however many I sent it to, less than 20 boys that got that letter. The most effective way is to send it in a letter to the parents.

Q. What about sending it in a letter that's not just for spring practice but it's in a compilation of all other events, spring practice, athletic events, non-athletic events, all other events, and it goes out to a whole group of students not just people that are interested in football?

A. Well, as I said earlier, we have a way we want to communicate with families and the end of May packet contains [430] information that they need to know about the summer and the next school year, the mid July packet has specific things that are included before that there's not one packet that goes out to everybody. And besides that, when we send packets we really want to send packets of information that apply to everybody. For example, when we send the schedules, we would send an individual schedule to each child, that wouldn't go out in a huge mass mailing. Spring practice is a targeted group of boys. Girls don't need to know about it. It's just boys. Middle school children wouldn't need to know about it. It's just upper

school boys.

We do the same thing with cheerleaders, cheerleading try outs for middle school and upper school are in the spring and we send those cheerleading try out letter information things to all girls in middle school, all girls in upper school, with specific dates on them for when those try outs are. It would serve no purpose to send it to everybody. I mean that would be a waste.

Q. Are you familiar with something The Tennessean called The Scoreboard, which is a thing The Tennessean runs that gives a listing of all the details of athletic events and so forth, ever seen that or heard of that?

A. I don't know. I don't know if I have or not.

Q. Ever think about sending out the spring practice **[431]** information or just putting it in The Scoreboard in The Tennessean?

A. is that the fact -- with all the stats on it and all the --

Q. Yes.

A. Okay. I know what that is. No. I would not put it in there.

Q. Why not?

A. A lot of people don't read the newspaper. I'll go -- this week I haven't read the paper all week. I mean --

Q. If you wanted to put some information in the newspaper about Brentwood Academy, which paper would you put it in? Or papers?

A. Well, I wouldn't. I mean Brentwood, Williamson County, we have several newspapers there, but not all of your students who come to Brentwood live in Williamson County don't get that paper, it would be an ineffective way.

Q. All right. Let me move to the issue of the educational marketplace for high school students in Davidson and Williamson County.

What are the public school choices for students in the Davidson and Williamson County area?

A. You mean like magnet schools?

Q. Yes.

A. Charter schools. **[432]**

Q. Who do you compete against -- who does Brentwood Academy compete against for students?

A. Public schools, independent schools, home schools, parochial schools, magnet schools. There are a lot of different schools.

Q. All right.

A. A lot of different options.

Q. Is there -- are there a lot of options available?

A. Yep.

Q. Is it important in competing for those students, is it important for all the schools to be able to tell their story about what their schools stand for and what they expect of students if they choose to come to school? It's crucial?

A. It's crucial.

Q. Why is that important?

A. Because parents deserve to know all the different opportunities that are available for their children so they can make a good choice for their child on which school they would want to attend. Every school has a different mission, a different emphasis, a different make-up, different faculty criteria. Parents need to know all about the different schools to make a good decision.

Q. Who decides, Ms. Brasher, where a child will go to high school?

A. I think the parents should decide that. **[433]**

Q. Is that what happens that you have observed in your experience as admissions director?

A. I think sometimes I have had parents tell me they let the child make that decision, but my counsel is always that the parents make that decision. Of course it depends on the age of the child. An older child might have more input than, say, a fifth grader.

Q. How do parents get information about their school choices, where do they get it?

A. Well, if they are interested in Brentwood Academy

they call Brentwood Academy. If they are interested in Brentwood High, then they would call Brentwood High.

Q. All right. Do they get it by word of mouth at all?

A. Oh, yes. They talk to other parents, they talk to alumni of those schools, alumni parents, people in their churches, civic groups, work, club teams, sports, ballet class. Yes, they talk a lot about schools, parents do.

Q. Let's talk about the other side of communications, just not the school telling its story, but is it important for the school to listen to the parents and to the child about what their interests are, what their expectations are, what their values are?

A. Yes. We have, as every school has, a specific mission and what a school is trying to do is to match the family, the child to the mix of the school. Not everybody is going **[434]** to like Brentwood Academy. Not everybody is going to fit in at Brentwood Academy. So it's really important to not only gather standardized testing and recommendations from teachers and application information, but it's very important, we have required interviews for every family, to look them in the eye, to talk about the details of our school because everybody wins if it's a good placement. If the parents know a lot of information, then they are able to make a good decision for their child. Parents have different priorities.

Q. Has the Board of Trustees of Brentwood Academy determined that diversity is an important goal for their school?

A. Yes. And I believe it's about ten years ago they did a very thorough longrange planning study in diversity, I think was one of the five -- I think there were five points.

Q. What kind of diversity is important to Brentwood Academy?

A. We're looking for -- we don't want cookie-cutter children in our school or families. We're looking for socioeconomic diversity, racial diversity, interests, different interests, we are looking for multi-culturalism. We want a

diverse student body.

Q. Why is that important to Brentwood, socioeconomic, racial and so forth? **[435]**

A. We're in the process of educating children. And the world is very diverse and multi-cultural and it's very important for children to go to school with different kinds of people. It's very important before we send them off to college, or into the working place, it's very important that they know how to get along with other people, appreciate different differences, learn to deal with all that.

Q. Is Brentwood Academy located in a fairly affluent part of town?

A. Yes, Williamson County.

Q. How does Brentwood Academy or has Brentwood Academy wanted to reach out to new students and families to promote diversity?

A. Have we wanted to?

Q. Yes.

A. Yes.

Q. How have you done that?

A. We really haven't been able to do that.

Q. Why not?

A. Because of TSSAA rules.

Q. Are there any restrictions that you're aware of, state, federal or local, governmental restrictions that prohibit the solicitation or the recruitment of students for academic purposes?

A. No. **[436]**

Q. Okay. The only restriction you know of is this recruiting rule the TSSAA has, is that right?

A. Yes.

Q. All right. How does it restrict Brentwood Academy's ability to tell its story?

A. Well, we don't understand, I mean it's very vague and we don't understand what we can do and what we can't do, so we have chosen to really not do anything.

Q. Have you had situations, specific situations at your

school in which you have wanted to increase the diversity, improve and promote the diversity, but been unable to do that?

A. Yes.

Q. Tell me about that.

A. Because the rule states, you know, children with or without an athletic record, say, if you're talking to a child, talking to a parent about a child, you don't know if they have an athletic record or not, so say there's a great violinist and I'm at a concert, I couldn't go up to that child if that child was in upper school, ninth grade, eighth grade, and talk to him or her about that because they also might be a great basketball player.

Q. Now what if she was a pure violinist and not an athlete and you know that, were there any restrictions on your communicating with the great violinist? **[437]**

A. No, if I knew that --

Q. Or the violinist's parents if you knew that?

A. If I knew what?

Q. You don't know, you don't know whether they are athletes or not, is there a limitation on communication there?

A. I don't think so. No.

Q. If you did not know -- let me go back and ask the question again.

If you did not know whether or not this violinist --

A. No, I did not know, I wouldn't do it.

Q. Why not?

A. Because there may be an athletic record or an interest in that.

Q. And then what? Might be a violation of the rule?

A. It might be, might not be. But it might be.

Q. It might be a violation of the recruiting rule?

A. Right.

Q. Now did you -- did Brentwood Academy several years ago have an interest in improving its diversity by attracting African-American women?

A. Yes.

Q. Tell me about that.

A. We bad several African-American males but one or two African-American girls and we were very concerned about that **[438]** because we had heard -- I mean we would have some African-American girls apply but they would not see any other -- any other African-American girls there and maybe even not come because of that. I don't know. But that could have been a reason they did not attend.

We also had some African-American parents who met with me very concerned, of boys, very concerned there were no girls at the school and why that was. And really offered to help me with that. To help with that.

Q. Well, why not just initiate contact with some African-American parent who may have children who're interested like maybe write a letter or make a telephone call?

A. Well, the recruiting rule would prohibit us from doing that if that child had a record, an athletic record.

Q. All right. Well, what did you do about the problem?

Did you do anything about it?

How did you communicate?

How did you get the word out that you were interested in increased diversity at your school?

A. Pretty much parents were the ones. The African-American parents were the ones who really I think talked about it among their communities and now we have several siblings there, family members, but we really can't -- we're prohibited from talking to -- from targeting any group.

Q. Now the recruiting rule, Ms. Brasher, as you currently **[439]** understand it, how far does it affect Brentwood Academy's ability to tell its story?

A. It affects it in that we depend upon our admission days to tell our story, those are two events, as I said earlier, in November and January or February, where families come to our school and we put an ad in the newspaper concerning those admission days. We have group meetings, once again

ads in the newspaper, campus visits. The school is always available for campus visits.

Q. Well, what about with your hope that African-American women would call and their families would call in interest, what do you do there? How did the recruiting rule affect your ability to tell your story there?

A. Well, we couldn't go out and find those women, those girls. If they had an athletic record, it would be -- the recruiting rule, we would be in violation of that.

Q. All right. What could you do there?

Just wait?

A. Wait for the phone to ring and hope that they would come to your admission days or call to ask to visit our campus.

Q. All right. If an African-American family at Brentwood Academy or a non African-American family had come to you and said, I know a family that has a child that I think would fit well with this school, would you write a letter, give a call to the parents and tell them that you would be **[440]** interested in having them come by and talk about coming to the school, could you do that?

A. No. I would -- no, I would ask that family to ask their friends to call me in the admission office.

Q. All right. And if they didn't call, --

A. I didn't call them.

Q. What about the issue of communicating with, let's just say the kids in a feeder pattern in a public school like Grassland Middle School, for example, Grassland Middle School is a school in the neighborhood of Brentwood Academy, right? Is that right?

A. Yes.

Q. Okay. And it feeds to another school, Franklin High School I believe, is that right?

A. Yes.

Q. Now why not just -- are you permitted to write a letter to any of the students in Grassland Middle's eighth grade inviting them to come and talk about Brentwood

Academy?

A. No.

Q. Why not'?

A. Because if they have an athletic record that would be a violation of the recruiting rule. And I wouldn't know that.

Q. Does Brentwood Academy have any feeder pattern schools?

A. No.

Q. Does the TSSAA permit Brentwood Academy to write a non-**[441]** targeted letter to the students at Grassland Middle school, for example, that goes to all 20 students in the eighth grade, let's say, at Grassland Middle saying, Hey, we would like for you, we have Brentwood Academy, we would like you to hear our story, we would like you to come by, is that permitted?

A. Yes, it's my understanding.

Q. Do you have to have a mailing list to get that?

A. Yes.

Q. Where did you get the mailing list?

A. I guess we have never done that. I guess I would have to call the principal of Grassland Middle and ask him to send me the mailing list.

Q. And if the principal did not send you the mailing list, how would you get it?

A. I don't know. I would think that would be the only way you could get it was to call the office.

Q. Have you ever had a situation in which a public middle school principal turned down your request to come and visit the public school and tell your story to the students there in the eighth grade?

A. If I ever had -- repeat that, please.

Q. Yes. Have you ever tried to visit the public middle schools and tell your story?

A. No. **[442]**

Q. Why not?

A. Because I think they would not let me do that. I don't think they want their children going to Brentwood,

looking into another school besides the public school that they're zoned for.

Q. Now why would a school principal, middle school principal or middle non-public school principal not want its students to know everything about educational opportunities at the high school level?

A. Because I think they want to protect their group and only send those to the upper school and they are not very interested in having their children explore other options in the private sector.

Q. Ms. Brasher, in your experience, is personal contact between parents and the child and school officials an important factor in determining there right fit, the right match for school and child?

A. It's very important. Sometimes even in the admission process as we are talking about our mission of our school there have been parents to withdraw from the admission process because they didn't think it was a fit, that we had priorities that they weren't interested in, and we have had some after they hear more about our school and about our mission and what we're trying to do with children, they become more interested, and it's very important to have that **[443]** personal contact and discussion of details of each child.

Q. Does the recruiting rule allow personal contact with parents and students by school officials at Brentwood Academy?

A. If they call us, if the parents initiate the contact, yes.

* * *

[446]

* * *

Q. Did you read the spring practice letter?

A. Yes.

Q. Did you think the letter was harmful in any way to parents or kids?

A. No.

Q. Why not?

A. I thought it gave dates, times, that it was optional, and to call Coach Flatt if they had any questions. I thought it was a short, to the point piece of communication.

* * *

[447]

* * *

Q. All right. When Brentwood Academy sent the spring practice letter out to these boys, was it trying to recruit those students?

A. No. They were already enrolled in our school.

Q. What about the follow up telephone calls? Did you encourage Coach Flatt to make these calls in order to recruit these students to Brentwood Academy?

A. No. They were already coming. I encouraged him to call to clear up information.

* * *

[451]

* * *

Q. All right. Now does -- well, Brentwood Academy considers athletic ability and potential in deciding in making its financial aid decisions, does it not?

A. No. It's need based.

Q. Well, I understand that they have to qualify for it based on need, but then in deciding whether to actually give it, how much to give, Brentwood Academy considers the student's character, leadership, academic and/or athletic

abilities and potential, right?

A. No. It's need based. All of those things that you said are part of our mission, and when we admit students we're [452] looking at those areas, but as far as who gets financial aid or not, it's purely based upon the need of the family.

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[Testimony of John Slaughter]

[476]

* * *

Q. I will show you what's been previously marked as Plaintiff's Exhibit 8. I ask you if that looks like a copy of the letter that Jake received?

A. It does.

Q. All right. Now what was -- did you see that letter when it came?

A. I did.

Q. What was your reaction to this letter when you saw it?

A. We were glad to get some contact with the football program there and we were really happy that he would get the opportunity to come to spring practice.

* * *

Q. All right. Did you think the letter was threatening? [477]

A. No, sir.

Q. Did you think it was harrassing?

A. No, sir.

Q. Did you think it was coercive?

A. No, sir.

Q. Did you think it was harmful in any way?

A. No, sir.

Q. The letter make you think that Brentwood Academy over emphasized sports?

A. No, sir.

Q. Did it make you think that Brentwood Academy treated athletes differently from non-athletes?

A. No, sir.

Q. Did you think the letter was inappropriate in any way?

A. No, sir. Like I say, we were glad to get the letter.

Q. Okay. Are you aware of other parents at Brentwood Academy who got the letter who thought it was inappropriate?

A. No. Not a one.

* * *

[Testimony of Joe Marley]

[489]

* * *

Q. Did you think the letter was inappropriate in any way, Mr. Marley?

A. I did not think it was inappropriate.

Q. Did you think it was threatening?

A. I did not think it was threatening.

Q. Harmful?

A. I did not think it was harmful.

Q. Coercive?

A. I did not think it was coercive.

Q. Did it influence your decision to send Ray Paul to Brentwood Academy?

A. It did not influence. We were already planning on sending him to Brentwood Academy.

Q. All right. Did you observe Ray Paul have a different reaction to the letter than yours?

A. No, sir.

* * *

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

[Caption Omitted in Printing]

TRANSCRIPT OF PROCEEDINGS – BENCH TRIAL

VOLUME III of Ten

BEFORE THE HON. TODD J. CAMPBELL,
U. S. District Judge

on December 13, 2002

* * *

[Testimony of George Pitts]

[513]

* * *

Q. * * * Would you state your name?

A. George S. Pitts the Third.

Q. And where are you employed, Mr. Pitts?

A. Brentwood Academy.

Q. How long have you been employed at Brentwood Academy?

A. This is my second year.

Q. What is your job at Brentwood Academy?

A. I'm the dean of students and the head men's basketball coach.

Q. All right. Before coming to Brentwood Academy, where were you employed?

A. Science Hill High School, in Johnson City, Tennessee.

Q. And you were at Science Hill for how many years?

A. 17.

Q. Okay. And in what capacity did you -- or capacities -- did you serve at Science Hill High School?

A. Initially head basketball coach and teacher, then [514] athletic director and head basketball coach and the last two years I was the principal.

Q. All right. Your CV indicates that as Science Hill basketball coach, in your 15 years, you had won some 460 games and lost 88, is that right?

A. Probably close. I guess.

Q. All right. I know you're a modest person, but I need to tell the court a little bit about your background.

In your ten years as head basketball, in your 26 years, actually your total basketball career, you have been head basketball coach actually at other high schools, right?

A. Correct.

Q. Now Science Hill High School is a public high school in Johnson City, is that right?

A. Correct.

Q. And before Science Hill High School, what other high schools have you served?

A. Young High School in Knoxville, South Young High School in Knoxville and Bearden High School in Knoxville.

Q. All right. And you started your coaching career at Young High School in Knoxville?

A. Correct.

Q. And that was in what year?

A. I started coaching in 1970.

Q. And you were at Young for how long? [515]

A. Six years.

Q. Okay. Then after Young, I guess you went to South Young, which is -- what is South Young?

A. They consolidated high schools, Young and South, and made a new school, South Young, and I was there five years.

Q. All right. And then you went -- you left there in 1980?

A. '81 I believe.

Q. '81. Where did you go in 1981?

A. Bearden High School in Knoxville.

Q. How long were you at Bearden High School?

A. Three years.

Q. Okay. You have won as head basketball coach some 15 district championships, that is right?

A. Yes, sir.

Q. And you have won nine regional championships?

A. Yes, sir.

Q. 12 sub-state championships?

A. Yes.

Q. All basketball?

A. Yes.

Q. Boys' basketball?

A. Yes.

Q. All right. Won three state championships?

A. Yes.

Q. Two state championship runner-ups? **[516]**

A. Yes.

Q. And your 1990 triple A team won 37, lost one, and was ranked 15th in the USA Today poll, is that right?

A. Yes.

Q. In 1994 your triple A state championship state basketball team won 37, lost two, and was ranked eleventh in the final USA poll, is that right?

A. Yes.

Q. In 1995 your triple A state champions won 37 games and lost three, was ranked seventh in the final USA poll, is that right?

A. Yes, sir.

Q. Are you a career ladder level three teacher?

A. Yes, sir.

Q. And what is that, Mr. Pitts?

A. Well, because of experience, going through different procedures with the state, you could be determined as career ladder one, two or three, and I was three. You know,

basically all it meant was I got a little more pay --

Q. All right.

A. -- with it.

Q. In 1999 were you inducted into the Knoxville Interscholastic League Hall of Fame?

A. Yes, sir.

Q. In 2000 were you inducted into the Northeast Tennessee **[517]** Hall of Fame?

A. Yes, sir.

Q. Now, Mr. Pitts, let's turn a moment to your experience at Science Hill High School, in Johnson City.

And I want to use those as an example here. Did Science Hill High School have a feeder school, feeder school from a middle school?

A. Yes, sir.

* * *

[518]

* * *

Q. Have you operated, worked under this rule for all your years in high school coaching and as a teacher and principal?

A. Yes, sir.

* * *

[519]

* * *

Q. Okay. Then down to number five.

A. Any contact between a member of the coaching staff or representative of the school and respective student athletes prior to, during or after contest at elementary

schools, middle schools and junior high schools, except when it's a definite pattern.

* * *

[520]

* * *

Q. Liberty Bell was the feeder for Science Hill?

A. Correct.

Q. All right. As the head basketball coach, did you attend any athletic contests at Liberty Bell Middle School?

A. Yes, sir. Several.

Q. Okay. And did you communicate with, talk with prospective student athletes, either during, prior to, during or after the contest at these middle schools? Did you communicate with them?

A. Yes, sir.

Q. Okay. How did you communicate with them?

What did you say to them, just in general?

A. Nice game, just talked with them. And most always it was after the game.

Q. Okay. Did you know these basketball players, Coach Pitts, at Liberty Bell, that were on the middle school team?

A. Yes, sir.

Q. How did you know them?

A. Well, when I was basketball coach at Science Hill I knew -- I knew kids, you know, all through the system, a lot from coming to our camp in the summer, and I would get to know them. I would go watch them play whenever, an elementary school, I would go watch them play, get to know [521] them, whenever, middle school, I would watch them play, I would talk with them.

So, you know, there's a lot of communication between myself and those kids all the way up through their elementary and middle school years.

* * *

[522]

* * *

Q. Right. Did you feel any restrictions imposed upon you by the recruiting rule in communicating with these players for Liberty Bell Middle School while you were there?

A. No, sir.

* * *

[523]

* * *

Q. Did you regard the recruiting rule as inhibiting, preventing or hindering your communication as the head basketball coach with the parents of any of these students at Liberty Bell Middle School during the contests or after the contests?

A. No, sir.

Q. Did the TSSAA ever accuse you of any -- using undue influence in your communications with students or with parents at Liberty Bell Middle School?

A. No, sir.

Q. If the students came up to you after the game and said, Coach Pitts, I have a question or I want to talk with you about Science Hill, were you permitted freely under the recruiting rule to talk with that child?

A. Yes, sir.

* * *

[524]

* * *

Q. Were you prohibited under the recruiting rule while you were at the contest from initiating communication with either the parents or the students?

A. No, sir.

* * *

[525]

* * *

Q. All right. Did you attend those elementary school games at the park and rec or at the Boys' Club?

A. Yes, sir.

Q. When you went to those games, did you have the opportunity to watch the games and observe these young boys playing basketball?

A. Yes, sir.

Q. Did you communicate with the boys either before, during or after the game?

A. Sometimes.

Q. And did you communicate with the parents either before, during or after the game?

A. Sometimes.

Q. Did you feel any -- bad question. Rephrase the question.

Were you restricted in any way by Section 21 of the recruiting rule in your communications with the players or the parents at the Boys' Club games? **[526]**

A. No, sir.

Q. Now you mentioned you also had communication with these kids at camps. What do you mean by that?

What kind of camps did you have?

A. We had a basketball camp for kids in grades K through eight in the summer for one week, for 15 years or so.

Q. All right. Who attended that basketball camp?

A. The vast majority of them were kids that were in the Johnson City School System.

Q. Were many of them in the elementary schools that would feed into Liberty Bell and ultimately into Johnson City? Into Science Hill?

A. Most of them.

Q. Okay. And did you get to talk with and communicate with the children and the parents at those summer camps?

A. With the children a lot, with the parents some.

Q. These summer camps are not prohibited in any way by the TSSAA recruiting rule, are they?

A. No. sir.

* * *

[527]

* * *

Q. Okay. Could you talk with the kids that were not in the feeder pattern?

A. Yes, sir.

Q. And did you talk with the kids that were not in the feeder pattern?

A. Yes, sir.

Q. Did the TSSAA ever raise any objection to your talking with these kids that were not in the feeder pattern at your summer camps?

A. No. sir.

* * *

[528]

* * *

Q. Eighth grade students, okay? The Liberty Bell eighth grade students, you wanted to invite them to spring practice in basketball. How did you do that while you were at Science Hill?

A. We would, or I would contact the principal at Liberty Bell, set up a meeting, go over, have the meeting with the kids, tell them when we would have spring practice, give them a little calendar-type memo that would tell them we were having spring practice, when we were going to summer camp, and then those kids that had had a physical were able to come to spring practice.

Q. Okay. Did the principal at Liberty Bell ever object to your coming to meet and holding a meeting about spring practice? [529]

A. No, sir. As long as we worked into when it was good for the school.

* * *

Q. All right. And how were the students invited to the spring practice meeting there at Liberty Bell Middle School?

A. Any boy interested in playing basketball at Science Hill High School.

Q. Was invited?

A. Yes, sir.

Q. Okay. And so the boys would show up and you, the coach, would you have any assistant coaches with you?

A. Usually not.

Q. Just you and the boys? You have to say yes or no.

A. Yes.

Q. Mr. Spence is taking it down.

Were there any parents at that meeting?

A. No, sir.

Q. What went on generally in that meeting? What communication went on?

What did you tell them and what did the boys tell [530] you?

A. Basically I would just tell them that we would have spring practice on such and such dates, that any boy that wanted to come to that could if they had a physical, we would look at them, see if we wanted to take them to camp with us. If we didn't take them, they could come back in the fall and try out again. If they didn't come in the spring they could come in the fall and try out again. Talk a little bit, encouraging them to do what they are supposed to do in school, those kind of things.

Q. All right. So there was a lot of information passed on about when things were going to happen and what was going to happen and what your expectations were, is that right?

A. Yes, sir.

* * *

[532]

* * *

Q. Now did the TSSAA at any time ever notify you that you were prohibited or hindered or barred or in any way in conducting these spring practice meetings on the campus of the middle school?

A. No, sir.

Q. When these Liberty Bell students were at this meeting, were they enrolled in Liberty Bell Middle School or were they enrolled in Science Hill?

A. Liberty Bell.

* * *

[534]

* * *

Q. There is a -- are you familiar with -- with the phrase initial contact under the recruiting rule?

A. Yes, sir.

Q. Okay. Was any of this face to face communication at the school's spring practice meeting, did the TSSAA ever take the position with you that this was a violation of the initial contact rule?

A. No, sir.

Q. You weren't even -- because you were in the feeder pattern, you weren't even under the initial contact rule with respect to the boys who were in the feeder pattern, right?

A. It's my understanding that I wasn't.

Q. All right. But if there were basketball players that [535] were outside the feeder pattern, you were restricted in contacting, making initial contact with those boys, weren't you?

A. Yes, sir.

Q. So that if there were students at another middle school not in the feeder pattern, you could not initiate contact with those students about the basketball program at Science Hill, could you? Under the recruiting rule?

A. That's correct.

* * *

[536]

* * *

Q. Did the parents have to sign any paperwork indicating to Science Hill that their child was registered for the class and was going to be coming in the fall or planned to come in the fall?

A. Yes, on the -- well, on the schedule, the four-year plan, there was parents' signatures.

Q. All right. Why do you have to have the parents' signature? It's fairly self-evident, but I want to make it clear in the record.

Why couldn't the child just sign I'm coming to Science Hill?

A. Because we want to make sure that the parents know what the courses the child's going to be taking.

Q. And these are minor children anyway, aren't they?

A. Yes, sir.

Q. You had to have a signature of an adult on the registration form, is that right?

A. Yes, sir. **[537]**

Q. And that registration is done in the spring?

A. Yes, sir.

* * *

[538]

* * *

Q. When you came down, did you try to come to the last game of the season for the middle school basketball team?

A. Yes, sir.

Q. And when you came to that game, or that meeting, did you try to talk with the players after the game?

A. Yes, sir.

Q. And what was the purpose of that talk with them?

A. I would go into the dressing room after the coach had talked with them, the coach knew I would come in, and just congratulate them on their year, and just tell them I look forward to them coming to Science Hill, that we would have a meeting in the spring and talk about the next year.

Q. And that Science Hill meeting would be that spring practice meeting that we talked about, is that right?

A. Yes, sir. Yes, sir.

* * *

[539]

* * *

Q. Okay. Now did Science Hill -- how did you understand that rule?

Did you understand -- what was the meaning of that rule as far as Science Hill's ability to offer free tickets to students in their feeder pattern?

A. We were able to.

* * *

[541]

* * *

Q. Okay. Did the TSSAA rule govern, as you understand it, grades below seventh grade, sixth grade and below?

A. No, sir.

Q. Do you know whether or not Science Hill High School was permitted to offer free tickets to football players for football games at the feeder middle -- at the feeder middle schools?

A. We did pretty much the same thing.

* * *

[542]

Q. Did y'all ever have the TSSAA ever raise any questions about the ticket policies at Science Hill High

School?

A. No, sir.

* * *

[546]

* * *

BY MR. BARFIELD.

Q. Has your school, Science Hill, ever been contacted by the TSSAA to object in any way to allowing the teams in to the games free of charge in the feeder pattern but not allowing all students in?

A. Not to my knowledge.

* * *

[Testimony of Ellis Haguewood]

[588]

* * *

Q. Let's talk about your experience at MUS first.

Can MUS live under the recruiting rule with enrollment as defined by the TSSAA being the date of matriculation plus three?

A. No independent school does.

Q. Why is that?

A. Technically. Well, --

Q. Why is that?

A. Well, recruiting rule forbids any contact, not just initial contact, with a coach at that school before the student is enrolled. All schools have summer sports camps, at least all independent schools have summer sports camps that are run by the coaches at that school. All independent schools

have preseason football practices at which the coaches actually contact the students. And those technical violations are not enforced because they would not be enforceable.

I mean they are just -- it wouldn't make any sense [589] not for -- for a football coach or a basketball coach or a soccer coach not to be able to talk to a kid in his summer camp who he will coach later that year because that student is enrolled. Yet the rule clearly states he can -- can have no contact with that student according to the definition of enrollment.

* * *

[626]

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Q. Okay. So if you want to influence a tuba player you have got, let's say there's an eighth grader out in the city of Memphis somewhere who is just an absolute prodigy of a tuba player and you have learned about this tuba player, and you want to influence this tuba player to come to MUS because of their talent, their musical talent and what they will bring to the school in just musical talent. That does not implicate the prohibition against undue influence for athletic purposes, does it?

A. No, sir. But if that tuba player were also great at basketball, you know, we might have an issue.

Q. You might have an issue?

A. A concern.

***

[630]

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Q. All right. There's no mention of academics or other

extracurricular activities, it's really just about sports, right?

A. It's about a specific incident, why would I put something in there about academics? It's about spring practice.

***

[Testimony of Michael Hammond]

[684]

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Q. Okay. Now during the hearing in Fayetteville, was there any evidence presented by the TSSAA?

A. No, sir.

Q. It's true that you and the other Board of Control members did not get any TSSAA evidence until you had adjourned to the deliberations phase?

A. I think that's correct.

Q. Do you know Gene Menees and Bernard Childress?

A. Yes.

Q. They were there that day, were they not?

A. Yes, sir. Yes, sir.

Q. Did they say anything? Did they say a word at all about the violations or the investigation or anything during the hearing phase and before the deliberation phase?

A. No, sir. Not that I remember.

Q. So is it accurate that Brentwood Academy presented its evidence that day without hearing the TSSAA'S evidence?

A. As far as I remember.

Q. Is that a yes?

A. I think that's a yes.

Q. All right. Now after the Brentwood Academy presented its defense, were there deliberations held?**[685]**

A. Yes, sir.

Q. Were these deliberations in executive session?

A. Yes, sir.

Q. And by executive session, that meant that it was closed to the public?

A. Yes, sir.

Q. And Brentwood Academy and its representatives were not allowed in the deliberations, is that right?

A. That's correct.

Q. You and Mr. Carter, Mr. Hammond, Mr. Dunn and Mr. Rogers all participated in the private deliberations?

A. Yes, sir.

Q. And you served as an advisor to Mr. Carter in those deliberations, is that right?

A. That's correct.

Q. And Mr. Dunn and Mr. Rogers were also advisors to Mr. Carter in that deliberations phase?

A. That's correct.

Q. Now there were also some other TSSAA persons who participated in the deliberations, were there not?

A. Yes, sir.

Q. Mr. Menees and Mr. Childress both participated in the deliberations?

A. Yes, sir.

Q. Now was Mr. Larry Taft also present?**[686]**

A. Mr. Taft was in and out. He really wasn't participating I wouldn't think.

Q. All right. Was he in for some of the deliberations?

A. I remember him coming in to take some orders to go get food was what I really remember hearing him doing. And I don't remember how long he was there. It started getting late.

Q. What was Mr. Taft's job at TSSAA?

A. He's sports information director.

Q. All right. Now what were Mr. Menees' and Mr. Childress's roles in the investigation?

A. To give us some information about things that they found in the investigation.

Q. Were they part of the investigation team that

investigated these allegations of illegal recruiting or improper recruiting by Brentwood Academy?

A. That's the way I understand it.

Q. Now did Mr. Childress and Mr. Menees or Mr. Menees present the TSSAA's evidence during the secret deliberations?

A. Yes.

Q. And the investigators during the secret deliberations, did they answer any questions?

A. Probably.

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[687]

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Q. * * * Did the investigators during the secret deliberations accuse Brentwood Academy of violations of the recruiting rule?

A. I wouldn't call it accusing. I would call it presenting us with information of what they found about Mr. King and his relationship with one of the students that was in **[688]** question.

Q. All right. They were presenting you the evidence that they had retrieved in their investigation?

A. Yes, sir.

Q. Okay. Now everything that you have heard about Bart King, you heard during the secret deliberations, right?

A. Yes, sir.

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[691]

* * *

Q. Okay. Then what evidence did you have to support the assertion that Mr. King acted like a scout for Brentwood Academy?

A. The information that was presented in the deliberations process.

* * *

Q. It is true that after the Fayetteville hearing the final decision, final authority for the decision in Fayetteville rested on the shoulders of Mr. Carter?

A. Yes, sir.

Q. All right. And then the consensus decision that was arrived at in Fayetteville was embodied in a letter dated August the 14th, is that right, from Mr. Carter to Brentwood Academy?

A. Yes, sir.

[693]

* * *

Q. Going back to Fayetteville just a minute, for one further question, during the deliberations there among you, and the other Board of Control members, was there a consensus in the room that Mr. King had served as a scout for Brentwood Academy in connection with the recruitment of Jacques Curry?**[694]**

A. I would probably characterize it that we felt like he had tried to influence Jacques Curry, yes.

Q. All right. Do you recall whether there was any specific evidence that Mr. King had promoted Brentwood Academy to Mr. Curry?

A. I don't recall.

Q. Okay. Now going back to Music City Sheraton for the hearing on the 23rd of August. Again, the situation was similar to Fayetteville, there was an open hearing for the

public and everybody to participate in at first then the Board of Control and TSSAA officials adjourned to executive session for confidential deliberations, is that right?

A. Yes, sir.

Q. Okay. Now I'm going to talk about the public hearing part of it first, as you a few questions about it.

Now in the public hearing part of the proceeding at the Music City Sheraton on August 23rd, 1997, did the TSSAA put on a case against Brentwood Academy?

A. No, sir.

Q. Now at that hearing that day, Brentwood Academy and their lawyers and their witnesses were the ones that spoke at the hearing, is that right?

A. Yes, sir.

Q. And then, as you said, the board then went into executive session to deliberate?**[695]**

A. Yes, sir.

Q. Now the Brentwood Academy representatives, their lawyers, the school officials and others were not allowed to be present in the deliberations, is that right?

A. That's correct.

Q. Now who was present in the deliberations, the secret deliberations at the Music City Sheraton on August the 23rd? Were you there?

A. Yes, sir.

Q. Okay. Was Mr. Dunn there?

A. Yes, sir.

Q. Was Mr. Rogers there?

A. Yes, sir.

Q. Was Mr. Carter there?

A. Yes, sir.

Q. Was Mr. Menees there?

A. Yes, sir.

Q. Was Mr. Childress there?

A. As far as I remember.

Q. All right. And were the other board members all

there?

A. Yes, sir.

Q. Now six of the nine Board of Control members had not been at the hearing in Fayetteville, correct?

A. That's correct.

Q. Now how did they hear the evidence against Brentwood **[696]** Academy?

A. Same way we had heard it in Fayetteville.

Q. How is that?

A. That it was presented by the staff who had conducted the investigation.

Q. Did Mr. Menees and Mr. Childress again present the case just as they had presented it in Fayetteville?

A. As far as I remember.

Q. Now did Mr. Carter participate in the deliberations?

A. Yes, but I think in a more passive role because our roles had shifted at that one, at that hearing the Board of Control was to make the decision.

Q. Right. Did he advise and answer questions from Board of Control members?

A. Yes.

Q. Did he participate in the communications and the discussions about these charges?

A. As far as I remember.

* * *

[697]

* * *

Q. Don't remember. Okay.

Now was there -- do you recall evidence presented during the deliberations at the Music City Sheraton about Bart King, Jacques Curry and Brentwood Academy?

A. I think so.

Q. Was Bart King discussed in that? In those

deliberations?

A. As far as I remember he was.

* * *

Q. And you could not -- there was not enough evidence to show a connection between Bart King and Brentwood Academy?

A. Yes.

Q. In the final hearing, that part of the findings was dropped?

[698]

A. That's the way I remember it.

Q. All right. Was this decision on August the 23rd reached by consensus?

A. I think so.

Q. Do you remember whether Bart King testified at the hearing in Nashville, at the Music City Sheraton?

A. I don't remember him testifying.

* * *

Q. Does Brentwood Academy have a feeder school?

A. No, sir.

[718]

* * *

Q. Okay. Now let me ask you this. Where on the scale -- we were talking about high influence, low influence, no influence. Where on this scale, in your mind, is the words undue influence? Where does it fall?

A. Pick a number?

Q. Pick a number.

A. Two or three maybe. You know, once you start getting very far from the bottom of that scale, you know, it starts exerting influence and then when you start talking

about undue influence you are getting into a judgment situation.

Q. Okay. What do you mean by a judgment situation?

A. In that you would have to look at all of the factors involved and how much influence you think it would exert.

Q. And would one of those factors include the content of [719] the spring practice letter?

A. Yes, sir.

Q. And what information was communicated in telephone calls from Coach Flatt to the parents?

A. All of those things, the fact that a call was made, who drafted the letter, who it's sent to, the contents of the letter, all of those things I think had to be considered together. And as we deliberated, you know, you could talk about each individual thing, but then you had to come back to the total amount of influence.

* * *

[726]

* * *

Q. Let me ask you about this. As a member of the Board of Control in your final appeal there at the Music City Sheraton, you and the other board members had to judge the content of this letter to determine whether there was undue, in part, to determine whether there was undue influence under the recruiting rule, isn't that true?

A. Yes.

* * *

[731]

* * *

Q. All right. Just one second, Mr. Hammond, I'm just about finished.

Have you ever heard public school coaches or principals say at the TSSAA meetings that you attended that independent schools were taking their students?

A. Just in conversation?

Q. Yes.

A. Yes.

Q. Do public school officials feel in some way due to the feeder pattern arrangement and so forth that the kids in their feeder pattern somehow belong to them?

A. Unh-unh.

* * *

[Testimony of Milbrey Ganick]

[741]

***

Q. All right. What happened after you got those letters?

A. Chandler decided that if MBA thought he was wait list material he would rather go to BA, so he went to BA.

Q. All right. So you decided to go to BA.

Did you fill out an enrollment contract?

A. We actually filled out -- we received the acceptance letter, and I believe it included a contract that we had to fill out and sign, and we did that. And attached a check with it and sent it back to Brentwood Academy sometime the early part of March, I believe.

Q. All right. And after you sent in this enrollment contract and the deposit check, what did you understand your relationship with the school to be?

A. Well, we were committed to go into that school by signing that contract.

[742]

Q. All right. Did you all continue to consider Montgomery Bell Academy after that?

A. No, sir.

Q. All right. After you sent in the enrollment contract, did you receive any other information from the school?

A. We did. We started to get some information sometime in the spring. We received a letter from Coach Flatt inviting us to attend football practice, spring football practice, but we also received information about the upcoming year, maybe, if I recall correctly, it was a summer reading list, maybe the schedule for the following year, events over the summer that maybe we were a part of.

Q. All right. And you said you received a letter from Coach Flatt?

A. That's correct.

Q. All right. Let me show you No. 8, please.

Ms Ganick, what you have been handed is a copy of an exhibit that's previously marked as Plaintiff's No. 8. It's also on the screen over here across the way.

Does that look like the letter you received from Coach Flatt?

A. Yes, it does.

Q. All right. What was your reaction to this letter when you received it? Your family received it?

A. Well, actually my son received it first. I happened to [743] be traveling for my job during that year and was out of town most of the year, and he called and said, Mom, we got a letter from Brentwood Academy asking me if I was interested -- if I wanted to participate in spring practice.

And I said, Well, do you want to?

He said, Well, yeah. I guess so.

So somewhere along the way, and I don't remember if I received a phone call from Coach Flatt or if I called him, but at some point there was some question as to whether or not Chandler could do that because of other sports, obligations for Ensworth, he played baseball and also ran track for

Ensworth in the eighth grade year. And my conversation with Coach Flatt was, no, absolutely, his first priority is what he is obligated to do at Ensworth. If he has time, he can participate, just if he wants to. That was the conversation.

Q. All right. So you understood from that that was optional?

A. Totally. No question about it.

Q. All right. Did you think this letter was inappropriate in any way?

A. Well, no. I mean it kind of was -- it made you start to feel like maybe you were going to be a part of the school somewhere along the way, come to the point we hadn't received a lot, he started getting some things about the **[744]** same time, but no, it was just sort of nice to hear from somebody.

Q. I guess it's safe to say then you didn't think the letter was coercive?

A. Not at all.

Q. Or harassing?

A. Not at all.

Q. Or threatening?

A. Not at all.

Q. Did you think it was inappropriate in any way?

A. I didn't. I didn't feel like it was. I mean I didn't know what to expect, but it certainly didn't make me feel uncomfortable getting it.

Q. Did this letter influence you to send Chandler to Brentwood Academy in any way?

A. No. By that time I had -- we had already committed to Brentwood Academy. There was no question in my mind that's where we were going.

Q. Did you observe Chandler have a different reaction to this letter than yourself?

A. No.

* * *

[765]

* * *

Q. That was one of the bits of information you got was a letter from Coach Flatt?

A. It was. We were thrilled to get it because anything we got from the school that gave us information about, you know, what we were supposed to be doing as new students in the school was helpful.

* * *

Q. I think you said you were glad to get this letter?

A. Very glad to get the letter, yes.

Q. Did you think the letter was inappropriate in any way?

A. No. [766]

Q. Did you think it was harmful?

A. No.

Q. Did you feel coerced or threatened by it?

A. No.

Q. Okay. Did the letter influence your decision to send Dru to the school?

A. No. We were already committed to go to the school. We thought that -- to me it still does, looking at it again, standard form letter, we were committed to the school at that point. We assumed that went to all in-coming freshmen.

Q. Did Dru see this letter?

A. To my knowledge, he probably did.

Q. All right. Did you ever observe him have a different reaction to the letter from yours?

A. No. We just looked at it as, you know, information coming from the school, which was actually long over due.

Q. All right. Did you ever talk to any Brentwood Academy parents who got the letter who thought

differently than you did about it?

A. No, no one ever said anything to me about it.

Q. Now when you got this letter, what was your understanding about whether spring practice was mandatory or optional?

A. Well, it's pretty clear it was optional. Dru was at Brentwood Middle at the time, and I can't remember whether **[767]** he was participating in a sport at that time. I know Dru participated in a few sports at Brentwood Middle but I don't know if he was at the time the letter arrived. But it's real clear to us it was optional. If you wanted to go, do. In fact, I don't remember the exact verbiage, I guess I could look at it up there, but seemed to me like it said something if you're currently involved in something else, kind of the impression, stay with your current commitment.

* * *

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

[Caption Omitted in Printing]

TRANSCRIPT OF PROCEEDINGS – BENCH TRIAL

VOLUME IV of Ten

BEFORE THE HON. TODD J. CAMPBELL,
U. S. District Judge

on December 16, 2002

* * *

[Testimony of Michael Obel-Omia]

[788]

* * *

Q. All right. Now is it necessary for independent schools like Roxbury-Latin to actively seek out and recruit students like you have described?

A. Yes, sir.

Q. Why is that?

A. Because we're well known in certain communities. If you go to certain communities in Boston, they know Roxbury-Latin. You say Roxbury-Latin, that means something to those families.

But Roxbury-Latin is very much dedicated to a diverse student body. We embrace diversity. We have embraced it since the first day we opened on August 30th, 1645. John Elliott, the founder of the school, was vilified for hosting a Jesuit priest in his home. We have had diversity since the very beginning. He actually died, John Elliott, in the service

of teaching a black slave how to read. So we have valued diversity from the very beginning of our creation.

And so in order to find that diversity, to have a diversity, I have to go out and find students. I have to go out and tell them what Roxbury-Latin is. There are certain communities near us that know Roxbury-Latin exceptionally [789] well.

Q. What kind of communities are those?

A. Those are rather affluent communities. Right around Roxbury-Latin, Roxbury-Latin is in West Roxbury, a part of Boston, southwest corner of Boston, and it's close to a number of communities, Needham where I live, Wellesley, Weston, that are very affluent. By every measure you can imagine they are affluent and these communities know us well. There are communities right to our north, Roslindale is one of the neighbors of West Roxbury, I went to an admissions fair in October and literally this place where I went, this Catholic school admissions fair, that school was literally a mile and-a-half from Roxbury-Latin and I met people that even -- they had never heard of the school. They live within two miles of the school, don't know it.

These are families that typically are not from higher socioeconomic families. So I have to go out there and introduce Roxbury-Latin to them, let them know that this is a wonderful school, let them know that we are eager to have them at our school.

* * *

[795]

* * *

Q. Well, you talked a little bit this morning about how there's a difference in the socioeconomic level of groups that knew about you.

A. Yes, sir.

Q. How do you go about reaching into lower

socioeconomic groups to get them to become interested in the school?

A. Well, first thing I do is go to the schools. As I said, the public schools, and I'll go to the schools, I will meet with the kids and more often than not the kids who are at a Boston public school, even in an advance work class, come from lower socioeconomic classes. That's the first way that I will do it.

* * *

A third way is through word of mouth. For instance, just last week a former guidance counselor at a local public school, who's retired, retired for three years, he telephoned me and said, Michael, I have these two great families in Brockton. Brockton is a severely depressed, **[796]** economically depressed part of Boston, city of champions, very, very poor area. And these are great, these are great kids.

So I sent out the form letter to them, to the families, and at the bottom I wrote, Milton Hagan's suggested you are great families. I'm hoping I have a chance to see you in the application process.

* * *

[800]

* * *

Q. Well, in your experience, what is the best way to reach out to lower socioeconomic groups and families like the type you're looking for?

A. Through personal contact. It's my going out and visiting these families, visiting their schools, seeing them, talk to them, explaining who we are, sharing Roxbury-Latin's story. That is the most effective way. As I noted on the cards that we have at open house, most kids that come,

the majority of them come, check off that they met me. That's what changed their life.

* * *

[810]

Q. Okay. I'm showing you what's been marked previously as Plaintiff's Exhibit 8, which is a copy of that letter. In your opinion, is this letter inconsistent with the type of communications that Roxbury-Latin would send out to incoming students?

A. No, sir. It's not inconsistent. It's consistent.

Q. All right. You said you were familiar with the recruiting rule?

A. Yes, sir.

Q. Now do you have to comply with a rule like this in your work at Roxbury-Latin?

A. Well, we do have rules, yes, we do have rules with recruitment, we do, but -- yes, we do.

Q. All right. Is it an undue influence standard like this?

A. No, it is not.

Q. All right. Well, if you had to operate under this type of rule, would you be able to perform your job?

A. No, I would not.

* * *

[817]

***

Q. Do other independent schools, independent secondary schools allow Roxbury-Latin to come in and tell Roxbury-Latin's story?

A. Other independent schools?

Q. Yes.

A. Yes.

Q. They allow other independent secondary schools that have grades nine through 12?

A. No. I go to independent schools that usually finish in eighth or ninth grade. I do go into schools that finish in ninth grade and do recruit their eighth graders.

Q. And certainly Roxbury-Latin does not allow Boston area public schools to come in and talk to its eighth graders to educate them about educational opportunities available at public schools, does it?

A. They choose not to. There's no recruitment by them. Boys who live in the Boston area who attend Roxbury-Latin who're interested in Boston public schools, I will facilitate their looking at those schools. A couple years ago one boy who's now a sophomore at Roxbury-Latin was wondering is this the right match for him, so he initiated **[818]** the Boston public school piece, he was wanted to go to Boston Latin, which is a public testing school, and I did everything possibl to help him with that piece. But we were blessed that he stayed with us, so --

Q. Does Roxbury-Latin invite public schools to come in and talk to its kids?

A. No, but they choose not to come. They don't go out and do recruiting.

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[Testimony of James Guthrie]

[842]

* * *

Q. Well, how do schools go by increasing diversity, in your experience?

A. In my experience it doesn't happen accidentally. It happens purposely. Sometimes we redraw attendance boundaries in public school districts to encourage diversity. That's a policy lever that can be pulled.

But in the instance of non-public schools, they don't have an attendance area which can be redrawn. They have to take more affirmative steps to enhance diversity, and maybe that's advertising, as was explored in questions previously this morning, but in my experience, frankly, it's almost door to door salesmanship. This is Fuller Brush salesmanship, this is knocking on doors, going in to low income neighborhoods, finding out where under-represented students live or play, talking to their parents, trying to get into their churches, trying to get into the social activities in which they engage, and explain to them that there are choices from which their children might benefit.

Q. That sounds like recruiting.

A. It is recruiting.

Q. Well, what is the best way -- maybe you have already answered that -- but what is the best way, in your opinion, to reach out to lower socioeconomic groups?

A. Well, in my experience I certainly like advertising, [843] whether it be newspapers targeted for particular geographic areas, I might like television ads, I like -- I like role models, be they Yo-Yo MA or Michael Vick or whatever, I like role models. That can be made attractive to students. I even like websites, which is wonderful if you have a computer at home. If you don't, so much for a

website.

But there's very little that can take the place of an impassioned recruiter such as I took the prior expert to be. There's very little that can take the place of that kind of committed personal contact, going out face to face, pressing the flesh and explaining to parents what's available to them.

Q. Well, why is that kind of personal contact necessary in order to reach those groups?

A. Well, the mass media isn't as accessible to them, certainly the web isn't as accessible to them, and much of their social fabric is built around a particular set of interactions and information flows that frequently don't include the mass media.

* * *

[Testimony of James Hulon Watson]

[897]

* * *

DIRECT EXAMINATION

BY MR. BARFIELD:

Q. Mr. Watson, you might make yourself comfortable. You need to speak into the microphone, not too close, not too far away, so that we can hear you well. There's water there in case you need it or would like it.

Mr. Watson, I'm going to proceed while they're working on this little technical issue. Would you state your name, please, sir, for the record?

A. James Hulon Watson.

* * *

Q. * * * What is your job, Mr. Watson? **[898]**

A. Presently I'm superintendent of schools for

Rutherford County.

Q. And you're about to retire or have retired or close to retirement?

A. December the 31st.

Q. Of this year?

A. Of this year.

Q. All right. How long have you been superintendent of schools in Rutherford County?

A. Five, five and-a-half years.

Q. What did do you before that?

A. I was principal of Riverdale High School.

Q. And where is Riverdale High School?

A. Rutherford County, Murfreesboro.

Q. All right. How long were you principal of Riverdale High School?

A. 18 years.

Q. And where were you educated originally?

A. I have a bachelor's from Middle Tennessee State University, and I have a master's from University of Virginia, an EDS from MTSU.

Q. All right. And now in 1996, late 1995, I guess, there was a football game at the Clinic Bowl at Vanderbilt University, is that right?

A. That's correct. **[899]**

Q. Who played in that football game?

A. Riverdale and Brentwood Academy.

Q. All right. Was that a big game?

A. Absolutely.

Q. Was it for the state championship?

A. Absolutely.

Q. And did Brentwood Academy prevail in that game?

A. They did.

Q. All right. When you left that game, how did you feel?

A. Normally how you feel when your team loses.

Q. All right.

A. That's sort of, you know, certainly not on a high. Sort of a low point.

Q. Your deposition, some years ago, May 12th of 1998, you told us you were quite upset with the loss, is that right?

A. That's correct.

Q. Why were you upset with the loss of the game?

A. Well, normally when you lose a game of that magnitude, whether it be a district game or a regional or a state championship game, as a principal of the school because you have so much involvement with the students and coaches and the community, it certainly upsets you.

Q. All right. Was the Murfreesboro community behind the Riverdale team that year as they pursued the game?

A. Yes, they were. **[900]**

Q. Was there a big crowd at the game?

A. Best of my recollection, yes.

Q. Now after that game, in the early part of January of 1996, what steps did you take, if any, to do something about the relationships between the public and private schools and the TSSAA?

A. I called approximately 25, 26 schools and met at Riverdale High School with the intent of presenting to the TSSAA to separate private and public schools.

Q. Okay.

A. As far as athletic competition is concerned.

Q. All right. So did you propose a complete split for athletic competition for both regular season and for the playoffs?

A. Yes.

Q. So your proposal was to have the private schools play themselves for regular season and championships and then have the public schools play themselves for regular seasons and championships?

A. That was the original proposal, yes.

Q. Okay. Now did you just dream this up overnight or had this idea been percolating around for prior years?

A. Well, other principals probably proposed that same idea, so from that standpoint probably wasn't new but it was new for me.

[901]

* * *

BY MR. BARFIELD:

Q. Now, Mr. Watson, this is a copy of a letter with apparently your signature dated January the 5th, 1996, to [902] Mr. Mike Asquith, is that right?

A. That's my signature, yes, it is.

Q. All right. Can you identify this as a true and accurate copy of the letter that you September to Mr. Asquith?

A. That's correct, it is.

Q. All right. Did you sent this letter also to some 25 or other public school officials?

A. Yes, I did.

Q. Now, Mr. Watson, I want you to read this letter to me into the record and then ask you some questions as we go along, all right?

* * *

Q. You may start reading with the first paragraph, if you would, Mr. Watson. [903]

A. Time has come for public school administrators to actually take a stand about the fairness of public school and private school athletic decisions. The student -- the school -- excuse me. The school, students and community should have the right to compete on an equal basis. A winning team and a state championship brings a sense of pride to the community and the school that cannot be described.

* * *

[Testimony of Mickey Dunn]

[989]

* * *

Q. Okay. Let me just call up page 25, lines 18 through 25. This is from your deposition.

Question: Do you remember any particular parts of the discussion, who said what, during that deliberation to make you conclude that Mr. King had been involved in offering Jacques Curry some illegal inducements?

Answer: We asked Mr. Childress what Jacques Curry told him, and if I recall Jacques had told him that Mr. King had indicated that he had arranged transportation for him.

A. I recall that.

* * *

[990]

* * *

Q. Now in choosing what evidence to give greater weight to, is it fair to say that in talking to Mr. Childress and an investigator whom you knew and I presume you respected that you would give his testimony greater weight than a sworn statement by someone else just on paper?

* * *

[991]

* * *

THE WITNESS: Yes. I mean -- if you're talking about anything specific, I guess you would have to ask me a specific instance, but as far as just in general, I mean if -- if I had information from, you know, that maybe Mr. Childress didn't have, it would make a difference in how I viewed it, but I mean if it was two different sides to one particular story, then I would think I would give credence to Mr.

Childress, yes.

* * *

Q. All right. Now were Bart King's actions a factor in the Fayetteville decision?

A. Sir?

Q. Were Bart King -- was Bart King -- did he play a factor in the Fayetteville decision? **[992]**

A. I remember him being, you know, a part of what all we heard, yes, sir.

Q. All right. And did he actually factor into the ultimate decision you all made?

A. I remember the name. I'm not -- I don't remember exactly what role he played. I remember that he was a part of it. I don't remember exactly what role he played.

* * *

[1009]

* * *

Q. Now as part of your August 23rd sanctions, Brentwood Academy also was found to violate the recruiting rule when Coach Flatt sent out what's now referred to as the spring practice letter to students who signed an enrollment contract with the school. Are you familiar with that?

A. Yes, sir. Yes, sir. Uh-huh.

Q. Now would the Board of Control in their deliberations, the final appeal, when the spring practice letter was a recruiting rule violation, did this discussion occur or did discussion occur about what Flatt -- about what Coach Flatt wrote in his letter?

A. Yes, sir.

Q. And did you all take the time to go through the letter and look exactly at what he had said and decide whether or

not you thought it was undue influence?

A. Yes, sir. We read the letter, yes, sir.

Q. All right. And did what the letter said play a factor in you determining whether or not you thought it was a recruiting rule violation or not a recruiting rule violation?

A. Yes, sir.

* * *

[1013]

Q. What about if it was the starting quarterback but instead of a birthday card it was a get well card because he had been in an accident, and he was a student, say, an eighth grade student, good football player, been in an accident and the high school football coach sends him a get well card, would that be a recruiting rule violation?

A. There again, I think it would depend on the circumstances. It would not necessarily, no.

* * *

[1031]

* * *

Q. So it's just a guide for you to be thinking about whether deciding how to apply the recruiting rule?

A. The questions and answers are there to help you understand the rule itself, yes.

Q. All right. And I assume that's true as well for the guidelines for understanding the recruiting rule and understanding what is undue influence?

A. Where are we talking about now?

Q. Just below question five.

A. Yes, sir.

Q. So those also are not binding on you as a decision-maker?

A. Correct.

* * *

[Testimony of Robert Morris Rogers]

[1042]

* * *

Q. Now during that hearing -- excuse me, during that deliberations process, did Mr. Childress and Mr. Menees provide you three board members and Mr. Carter with information?

A. As I remember we asked them questions. I don't -- I don't remember how much information, but I know we asked a lot of questions. That's our basic nature.

* * *

[1043]

* * *

Q. And TSSAA didn't present any evidence during that public hearing, that was Brentwood Academy's time, correct?

A. That was their presentation, correct.

Q. All right. But TSSAA did provide you nine board members **[1044]** with information during the deliberations process, correct?

A. As we asked them questions, correct.

Q. And those are once again private deliberations?

A. As I remember it, yes.

Q. And Brentwood Academy representatives were not part of that process?

A. I don't think so.

* * *

[1053]

* * *

Q. Now the question and answer in the guidelines, those don't bind you as a Board of Control member when you're making decisions, correct?

A. Bind us?

Q. Right.

A. I don't think so.

* * *

[1056]

* * *

Q. Mr. Rogers, I would like to show you your deposition, page 72, line 16, starting at line 16.

What is the purpose of the recruiting rule?

Your answer was, I think that's obvious. That was getting into my area of what I think it ought to be. And it's really for protection of schools and coaches. But, you know, the obvious thing is to keep me and schools or Coach Flatt's school or anyone, anybody else's school from obtaining, since we're talking about athletics here. Athletic services of students and pupils without their just **[1057]** clear-cut choice, without any pressures or influence from me to bring them here. I mean that is the purpose, is to keep that from happening, you know, whether it works or not. Obviously we could debate for hours in the working part of that. I wish we had something that was much, much more hard-lined. I wish there was no contact whatsoever. You know, personally. I wish the only people that could ever talk to a kid coming to your school of any kind, band member or just Joe kid, is a guidance and administrator. I don't see the need

for anybody else to talk to them. It would be a lot simpler.

A. Sure would.

Q. Do you agree that that was an accurate statement?

A. That's what I said.

* * *

[1058]

* * *

Q. Keeps them from losing their best players?

A. No, I think it protects -- well, yes, it does. It does do that. You know, if it works.

* * *

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

[Caption Omitted in Printing]

TRANSCRIPT OF PROCEEDINGS - BENCH TRIAL

VOLUME V of Ten

BEFORE THE HON. TODD J. CAMPBELL,
U. S. District Judge

on December 17, 2002

* * *

[Testimony of Ronald Lee Carter]

[1088]

Q. * * * I mean was that phrase in it from the outset?

A. I would have to --

Q. From your view of the history, I know you weren't there, were you?

A. No, sir. First of all, I would have to go back and, you know, have to have a copy of that to look and see exactly how -- what the wording was, what the terminology was, so I don't have that in front of me at the present time.

Q. All right. I'm going to hand you what your research, I guess in this case research, has revealed is the TSSAA constitution and by-laws effective July 1951, which is Exhibit 74. And I'm going to hand you No. 74. And I think this is actually an excerpt. I ask you if you can identify this as a copy of or a part of the TSSAA constitution and by-laws, but in particular, referring to the recruiting rule.

A. Yes, sir, I'm assuming that these pages have come from what's here on the cover.

Q. All right. And, if you would, let's look at the language of that and, Sandy, if you would put that up. It's Section 20, bottom of page one and top of the other.

And, Mr. Carter, I ask you if you would read for us the recruiting rule in its entirety into the record.

A. The use of undue influence by anyone in causing or attempting to cause a student to transfer from one school to **[1089]** another for athletic purposes shall render the student ineligible for 12 months are the school shall be penalized.

Q. Okay.

MR. BARFIELD: Your Honor, if you get to -- you have that in your materials?

THE COURT: It's 74?

MR. BARFIELD: 74.

THE COURT: 74.

MR. BARFIELD: I wanted to be sure.

THE COURT: I've got it.

MR. BARFIELD: All right.

BY MR. BARFIELD:

Q. Now it looks like the 1990 -- 1951 version of this, which is the earliest one that has been produced in discovery in this case, deals with really transfers from one school to another; am I right about that?

A. Yes, sir.

Q. And so that would be like a situation where a student is in one high school and transfers to another high school?

A. No, sir.

Q. It could include that?

A. Well, it could include that, but it would be -- you have to understand the definition of transfer at that particular time, would have been any students going from one school to another, so it could have been from high school to high **[1090]** school, junior high to high school, could have been going from, theoritically, any school, K through 12, might have been transferring to sixth grade to another school. So it applies simply -- to transfer means was in one school last year and is from another school this year or last week and

this week.

Q. All right. The language for athletic purposes is in there in 1951, right?

A. Yes, sir.

Q. And the attempts are in there, at least for the student, right? The penalty is ineligibility for 12 months and the school shall be penalized?

A. Yes, sir.

Q. Right?

Okay. Now the penalty apparently rested in the discretion of the executive director at that time, as to what penalty is going to be imposed upon the school, because it's not in the rule itself, is that right?

A. The penalty for the school?

Q. Yes, sir.

A. Yes, sir. It would be under the responsibilities of the director.

Q. All right. And it would be in the director's discretion to say, you know, this is the appropriate penalty for the school, that's the appropriate penalty for whatever, right?

[1091]

* * *

A. That's correct.

Q. Now, Mr. Carter, I'm going to hand you what's been marked as Plaintiff's Exhibit 75, which appears to be a copy of the official handbook of '58 and '59, for the TSSAA. And it also contains an excerpt on the recruiting rule. I'm going to ask Sandy, if you would, put that recruiting rule up on the board so we can read it. And let's take a look and see what seven or eight years later the TSSAA whether they have made any changes or not.

What does the recruiting rule Section 20 say?

A. The use of undue influence by any person connected or not connected with the school to secure or to retain a student or the parents or guardians of a student for athletic

purposes may cause the student to become ineligible and will make the school subject to penalty.

Q. All right. So there are a couple of changes here, that language of undue influence stays in the rule in '58-'59, correct?

A. Yes, sir. **[1092]**

Q. They add this business about connected and not connected, correct?

A. Yes, sir.

Q. That wasn't in there before?

A. Yes, sir.

Q. They have got the notion of secure and retained. That comes in there in 1958, doesn't it?

A. Yes, sir.

* * *

Q. The 1951 rule had said that the – did include the language for athletic purposes, didn't it? **[1093]**

A. Yes, sir.

Q. And so does the 1958 rule, correct?

A. Yes, sir.

Q. Okay. But the penalty has been changed in the 1958 rule for the student, is that right?

A. The 1951 rule states that the student – shall render the student ineligible for 12 months, and the 1958 says may cause the student to become ineligible.

Q. All right. So that leaves some discretion, does it not, in the executive director and the TSSAA to decide whether or not the student will become ineligible?

A. That's correct.

* * *

[1094]

* * *

A. I don't mean -- I think, first of all, you have to understand our book is not written for lawyers. It's written by school people. It would have been written by school people in '25, '58 or today. It's written by school people for school people.

And I think very simply it is what it says it is in '58 and that is if you have a violation -- if you have a violation of the recruiting rule, Section 20, that it will make the school subject to penalty. Just does not spell out what the penalty is.

Q. All right.

* * *

BY MR. BARFIELD:

Q. Okay. Next I want to hand you Exhibit 76, which is a copy of Plaintiff's Exhibit 76, which is a copy of the 1978-'79 handbook of the TSSAA and an excerpt dealing with the recruiting rule. **[1095]**

And I'll ask Ms. Ward if she could put the recruiting rule up on the board for us.

Mr. Carter, would you read the 1978-'79 version of the recruiting rule?

A. The use of undue influence on a student, parents or guardians of a student by any person connected or not connected with the school to secure or to retain a student or are for athletic purposes may cause the student to become ineligible and will make the school subject to penalty.

Q. All right. Does that differ from the prior version?

A. There is some change. I mean there are some changes in some wording.

Q. Okay. What word changes do you recognize?

A. The last one you gave me, the '78 starts off the use of undue influence on a student, parents or guardians of a student.

This one starts off the use of any undue influence by any person connected or not connected with the school, so there is just a change in the phraseology in the sentence.

Q. All right. But connected, not connected, is in both versions, right?

A. That's correct.

Q. All right.

A. You want me to continue?

Q. Yes. Any other differences? **[1096]**

A. Not that I see.

Q. Okay. In looking at this -- in this rule, going to the penalty phrase of it, this is in 1978 and '79, and actually for 20 years basically the rule stays the same, right?

From '51 to '78, right?

A. Right.

* * *

Q. * * * You started when?

A. With TSSAA?

Q. Yes.

A. I started in the summer of '78.

Q. So you started just about this time that this rule's coming on, right?

That's -- your tenure begins about that time, **[1097]** right?

A. The rule's not coming on now. The rule's -- I had been teaching and coaching for eleven years prior to this, so I have been very familiar with the rule prior to this.

Q. Now I want to ask you a couple of short questions about this Section 21, Mr. Carter.

On the penalty phase where it says for athletic purposes may cause the penalty -- the student to become ineligible, is a permissive word, isn't it? May is permissive?

So it doesn't say shall cause the student to become ineligible, it now says the student may become ineligible, right?

A. That's correct.

Q. All right. And you understand that when you have a permissive word like that it gives some discretion to the decision-maker about whether to impose the penalty or not?

A. That's correct.

Q. It's not mandatory, so you don't have to impose it, are you with me?

A. That's correct.

* * *

[1099]

* * *

Q. Now, Mr. Carter, let me hand you what's been marked Plaintiff's Exhibit 77.

Plaintiff's Exhibit 77 is the '84-'85 handbook, excerpts of it, which includes some changes to the recruiting rule.

And, Ms. Ward, if you could put up Section 21.

Okay. In 1984 and '85 how did the rule read? It now became Section 21. Read it into the record, please, sir, Mr. Carter.

A. This section has been changed, is that the part you want me to read?

Q. No. You can go on to the rule itself.

A. Okay.

Q. It's up on the screen there.

A. The use of undue influence on a student (with or without an athletic record) his parents or guardians of a student by **[1100]** any person connected or not connected with the school to secure or retain a student for athletic purposes shall be a violation of the recruiting rule.

Q. All right. Now what changes do you notice there, Mr. Carter?

A. The insertion of the word, the parentheses with or without an athletic record.

Q. All right. You were executive director in 1984, were you not?

A. No, sir.

Q. You were assistant executive director in '84? '84?

A. Yes, sir.

Q. 1984. You were assistant executive director in '84?

A. Yes, sir.

Q. You were on the staff of the TSSAA --

A. Yes, sir.

Q. -- at that time? Okay.

Do you know of your own personal knowledge why the language with or without an athletic record was added to Section 21?

A. Yes, sir. You have to understand what athletic record means to our schools.

Q. What does athletic record mean to our schools?

A. Athletic --

Q. Let me rephrase that. **[1101]**

What does athletic record mean to the TSSAA?

A. Athletic record means the student participated in athletics last year or last week at a member school. An athletic record is a record at a member school.

Q. Does that include intermural athletics?

A. No, sir. An athletic record -- let me state again, an athletic record with TSSAA, which is in competitive athletics against other schools interscholastically, and would mean you have an athletic record with a member school.

Q. All right. So if you are in -- there are no TSSAA member schools below the seventh grade, are there?

A. I don't know what your question is.

Q. In the sixth grade, have you got any TSSAA member schools in the sixth grade?

A. We got schools that are K 12s that would be members that would have kindergarten students in it.

Q. But you don't have jurisdiction, the TSSAA does not have jurisdiction below the seventh grade, does it?

A. No, sir.

Q. So if a child plays in a sixth grade football game for an elementary school, that child does not have an athletic record, right?

A. That's correct.

Q. But if the child plays in the seventh grade and that

school is a member of the TSSAA, that child plays in a **[1102]** football game, that child does have an athletic record?

A. Not necessarily.

Q. Not necessarily. All right.

Why not?

A. The school could be playing middle school athletics and the student -- the school could be placed in -- not be a member of the middle school association, which would not even be a TSSAA record. You could not have one at the seventh grade because it's referencing to the TSSAA record, meaning a high school record. Seventh graders cannot participate at the varsity level.

Q. All right. Now that we understand what the TSSAA definition of athletic record is, why did the TSSAA, if you know, why did they expand the rule to include the language with or without an athletic record to modify students?

A. You're seeing a transition of schools across the state of Tennessee about this, in this particular time. In the past you had -- we had probably, I don't know the number in '84, but we had had at one time when I came in, we probably had about 275 to 300 what we would refer to as junior high schools. Definition for us is true junior highs which meant they terminate at the ninth grade.

You're seeing a movement going across Tennessee of schools changing from seven through nine and ten through twelves to schools that were K eight, seven and eight, six **[1103]** eights, all kinds of arrangements there and nine through twelves.

Students that were in schools terminating at the eighth grade did not have athletic records because they could not be members of the TSSAA. You had to have the ninth grade to be a member of TSSAA.

The point that you can see from the school people's perspective is this, it doesn't make any difference whether they have had any athletic record or not, if it's a true junior high they are seventh and eighth and ninth graders

participating for Humboldt Junior High School, they have got an athletic record.

If it is Humboldt Middle School -- I'm just changing the school right now. If it's Humboldt Middle School, and the students are participating at the seventh and eighth grade level there, the fact that they don't have a TSSAA record does not mean that you can't have recruiting violations. That's what you see, the thinking of the school people in terms of what's taking place, which also is coupled with you have to realize there was beginning to develop sort of a mentality among some of our coaches that if they are not in a TSSAA school, recruiting rule only could apply to member schools moving back and forth in that light.

So what you see is sort of an overall theme or **[1104]** message coming to the schools that you can have undue influence at any level there in particular with members and non-member schools.

* * *

Q. Now let me hand you Exhibit 61. I believe that has been marked, has it not? Been admitted, Exhibit 61?

Ms. Ward, if you could put up the Section 2 up there, the second paragraph.

Now I have handed you what has been marked as Plaintiff's Exhibit 61, which is a copy of the constitution and by-laws of the TSSAA, effective in 19 -- I think effective in July of 1997, at the time all of these incidents were going on.

Put the next paragraph up, please.

Now the constitution of the association in 1997 contained an Article I, Section 2, which I put up on the **[1105]** board there, and I would like, Mr. Carter, if you would to read that into the record for us.

A. You want me to read Article 1 --

Q. Yes, sir.

A.-- Section 2 in its entirety?

Q. Yes, sir. Yes, sir.

A. The purpose of the incorporation shall be as stated in

the Charter of Incorporation and in addition to stimulate and regulate the athletic relations of the secondary schools in Tennessee.

* * *

[1211]

* * *

Q. They were permitted to go to spring practice in football, were they not?

A. Yes, sir.

Q. You just penalized Brentwood Academy for communicating about a permissible activity, didn't you?

A. No, sir.

Q. If spring practice was such a big problem for you, Mr. Carter, why didn't the TSSAA just outlaw it?

A. Well, it did, the rule was changeed, oh, I think probably this particular year or year later, but, again, you would have to know the whole sort of history of spring practice at schools, how it occurred and what was taking place in education. This particular -- I guess you would say the fact that we didn't prohibit students coming from another school to go to spring practice, that it had; probably outgrown its use in terms of a rule. Probably something that should have been changed years ago, but there were schools in transition and you got to know that whole history.

* * *

[Testimony of Sharon Stoll]

[1241]

***

Q. Okay. Professor Stoll, how does a rule which

prohibits athletic recruiting at the high school level, how does such a rule promote fair competition or a level playing field?

A. When we look at the purpose of a recruiting rule, we have to look at how that is related to the purpose of the activity. High school sport. We look at the TSSAA's constitution and there are two points of who they are, what their purpose is.

Second point talks about sportsmanship. And the teaching of sportsmanship and citizenship.

Now what is recruiting? What does recruiting do? Recruiting brings in individuals who're going to have perhaps more skills and talent than another person.

Let's assume that we have a school that cannot recruit or does not have the facilities or resources to recruit, and they play the game according to the type of student that they get to come in. And they are limited because maybe geographically or whatever.

So as one of my old coaches used to say, You are dealt the hand you're dealt and you play the circus with the animals that you're given. That sounds really rude but that's the way coaches think.

So you want to have so many players who have these **[1242]** certain abilities, only a few players may have a lot of gifts and others may have a few talents but you're limited by what you're doing.

Now let's assume, Chris, that you are one of those schools so you have limited abilities of what kind of talent you have and the skills that you have.

Let's assume that I have more resources and I play against you and I go out and increase my chances of winning because I can gain athletes who're more talented and more skilled. When that occurs, and we play against each other in competition, fair play doesn't exist any more because you're going to win, you're going to win probably every time we compete against each other because you're going to have -- I'm sorry, I'm going to have more than you're going to have

so you're not going to be able to.

So the whole notion of recruiting tries to keep that feel so that there is an equal chance for success on both sides. And that's the purpose of recruiting rule, to try to control so that that equal chance can exist.

* * *

[1298]

* * *

Q. All right. Now in forming your opinions in this case did you draw any distinctions between speech and conduct on the part of coaches?

A. Between speech and conduct?

Q. Right.

A. Meaning?

Q. Well, speech of course means communication back and forth between two people, and conduct meaning like the giving of inducements, like money, to a student.

A. I'm sorry, I don't understand the question. What's the **[1299]** difference between speech and conduct?

Q, No, ma'am. I'm asking you in arriving at your opinions, did you draw any distinction in your mind between those two things?

A. Well, yes, there's a difference between the two, if that's what you're asking me.

Q. All right. Well, did you draw -- did you use that distinction between the two in forming your opinions?

A. Well, my opinion was on the expert testimony of other people, it wasn't on the recruiting rule. I'm sorry, I'm not trying to be obnoxious, I don't understand. Is there a difference between speech and conduct?

* * *

[1300]

Q. All right. That's not exactly my question.

My question is do you see those two things, the speech and the conduct, as being the same things? Or you see them as being different things in terms of whether they impact upon the recruiting rule?

A. You know, if a coach went up and patted a kid on the back, a very important coach, and just patted him on the back and winked at him, the fact that that kid knew who they are, that's important action. So I don't see a difference between the two. Maybe there is. But if it's an important person, it's not just Joe Blow on the street, it's an important person and their actions and their speech have effects.

* * *

[Testimony of Michael Reed]

[1370]

* * *

Q. Now the final appeal involved all nine members of the Board of Control, is that accurate?

A. That's accurate.

Q. And you, in fact, were the president of the Board of Control at that time?

A. Right. Uh-huh.

Q. And you sat on that appeal? **[1371]**

A. Yes.

Q. Now at that appeal, which occurred -- did that occur at the Sheraton here in Nashville, about August 23rd --

A. Correct. Correct.

Q. -- of '97, is that correct?

A. Correct. Yes.

Q. Yes. Now at that appeal did Brentwood Academy present its case in an open forum?

A. Yes.

Q. They did.

And after Brentwood Academy presented its case, did you and the other board members and Mr. Carter retire behind closed doors?

A. We went in executive session, correct.

Q. And executive session means that it was a private deliberations process, correct?

A. Correct.

Q. And Brentwood Academy was not permitted to have representatives in your deliberations, correct?

A. That's correct.

Q. But in those deliberations, Mr. Carter was present, was he not?

A. Correct.

Q. Because he is the executive director?

A. Correct. **[1372]**

Q. And Mr. Childress and Mr. Menees, the other two investigators, were also present, were they not?

A. Correct.

Q. And during your private deliberations, Mr. Childress and Mr. Menees provided you and the other board members with information about what they found in the course of their investigation, is that accurate?

A. We had already been supplied that. We had already been given what they found before the meeting.

* * *

Q. Were you provided with materials that Brentwood Academy had submitted in its earlier presentations?

A. No. Not to my knowledge. Now, you know, I can't recall. Now, you know, in those hearings that we have, of that nature, those people are there for the board to ask any questions that they may want to ask those investigators, concerning Brentwood Academy.

Q. All right. Did any investigator from the state office, Mr. Childress, Mr. Carter or Mr. Menees, report that they

[1373] thought Mr. King had engaged in conduct that caused Brentwood Academy to violate the recruiting rule?

A. Mr. King was discussed. Now I can't go back and recall just exactly who presented the situation, but Mr. King, the situation with Mr. King was discussed.

Q. All right. And in your deposition you stated that you were asked, which one? Mr. Childress? And at that time you said that you weren't sure it was one of the two of them, is that true?

A. I'm not sure today.

Q. All right. But it was discussed.

Q. Would it have either been -- would that information have come to you either from Mr. Carter, Mr. Childress or Mr. Menees, one of the three investigators?

A. Yes, it would. We have an opportunity to ask them questions in that session to find out what they found out.

Q. All right. And did the Board of Control members take the opportunity and actually ask them questions?

Is that a yes?

A. Yes.

* * *

[1379]

* * *

Q. All right. Was it one of the factors in your finding a penalty or was --

A. Oh, it was a factor. Now, you know, what was going on and so forth, was it a factor? Sure. I think though the [1380] board was really looking for a way to make those three kids eligible that were ruled ineligible, and so they gave the situation with Bart King the benefit of the doubt, and that's the reason it wasn't included in those three.

Q. So it was a factor in your final decision, if not the primary?

A. It was discussed and it was a factor in the overall

penalty. We had to look at the whole picture, as I mentioned to you earlier what all took place, it was probably a factor in the overall penalty, especially the four-year probation, and the fine, yes, but as far as one of those three, it's not there. It's not.

* * *

[1390]

* * *

Q. Okay. Now the difference between the Warrior letter from Coach Rankin and the spring practice letter from Coach Flatt, would you agree the difference in the two letters is what they say?

A. Right.

Q. All right.

A. You got to -- I view the letters as look at what they say, what kind of feeling are they generating to those students and that sort of thing.

Q. When you say --

A. This is more of an information letter. And I think the other letter from Brentwood Academy is more of a letter enticing them, you know, you're here now, but now keep this in mind, those kids that received that letter from Brentwood Academy were enrolled in another school at that time.

Q. All right. But you would agree, and you did agree in fact that Coach Rankin had sent that letter to kids who were enrolled? **[1391]**

A. I don't know look he sent that letter to. I don't know. That letter, you know, that hasn't been said really who he sent it to. But that's more of an information letter, the way I view it.

Q. All right. Okay. And you mentioned what the letter says. As a factor or a difference would you also consider the different impacts it would have on the kids who would get the letter? The different effects it would have on the kids

who received it?

A. Yes.

Q. I'm sorry?

A. Yes.

Q. All right. So when you decided that the spring practice letter was a violation of the recruiting rule, one of the factors you considered was how it would impact the person who read it?

A. Sure.

* * *

[1397]

* * *

Q. Okay. Now let me just ask you once again to look at the spring practice letter and the basis for the board's decision, the concensus decision of the Board of Control. As I understand it, the factors that went into you determining this was a violation were the message of the spring practice letter, the person that wrote the letter, which was Coach Flatt, the person who received the letter, the fact that the students were enrolled in other schools, and the impact that that message had on the students or that you thought it would have on the students?

A. Content of the letter.

Q. Okay.

A. The message that it sends.

* * *

Q. Are there any other reasons other than the ones I just listed that would cause this letter to be a violation of the **[1398]** recruiting rule?

A. Well, I don't know everything you listed, but look, due to the inconvenience of your parents, please do not feel that you must attend every practice. However, I do feel

that getting involved as soon as possible would definitely be to your advantage.

To me that's telling them you need to be at practice. You are going to get left behind if you're not there. You're enticing them to be at practice, when they are not your students.

Also, I think we mentioned he had his home phone, you can call at home, your coach. As well as the other things mentioned there.

Q. So in response to my question whether there are any other factors that you can think of other than the five that I listed just a second ago that led you to finding this letter to be a violation of the recruiting rule?

A. Those that I mentioned. I don't know if the last thing we had here, if that's one of your five or not.

Q. All right. Including that. Are there any other ones? I just want to make sure I have all the factors that led you to convict Brentwood Academy based on this letter.

A. Okay. You have got -- you have the letter going out to athletes.

Q. The fact it was from Coach Flatt, correct? **[1399]**

A. It was from Coach Flatt.

Q. A famous coach?

A. A well known coach.

Q. A well known coach?

A. Okay.

Q. The impact it's going to have on the reader?

A. Right.

Q. The message that the letter sends, the content of the letter?

A. Content of the letter, enticing them to be there or you're going to get behind if you don't show up. Call me at home if you would like. Signed, Your coach, who's not his coach at the time. Those are the things that I'm referring to.

Q. All right.

* * *

[1404]

* * *

Q. Mr. Reed, Mr. Colbert referred to the way the letter was written.

My question to you is what about the way the content of Coach Flatt's letter was delivered caused there to be a reciting rule violation?

A. Repeat that. The way what?

Q. What about the way this letter is worded caused it to be a recruiting rule violation?

A. The letter is putting pressure on the student to attend the spring practice, correct.

Q. And how do you determine the way that it does this?

A. Well, the overrule -- the overall theme of the letter, encouraging those kids to go to spring practice.

Q. You're talking about what the letter says and the impact it's going to have on the kids?

A. Right, the impression, the overall feeling of the letter as you read this letter, the overall sense that you get from the letter, the recruiting violation.

* * *

[Testimony of Scott Brunette]

[1415]

* * *

Q. But it would be okay to bring them pieces of clothing, the example that was used in your deposition was this being a Hunters Lane coach going to one of Hunters Lane feeder schools and Neely's Bend was the example that was being used and the question was, Would it okay and give those kids hats and T-shirts and say, hey, I hope you guys come to Hunters Lane High School next year, that be

okay?

A. Not only would it be okay, I would promote our high schools to go to their feeder schools, have a good relationship. Once again, if all the students are treated the same way.

Q. Okay. Now what if that kind of contact by the coach -- what if the coach went in and he just gave that presentation to the eighth grade football team, but it was the whole eighth grade football team and he said, I want you guys to **[1416]** come, I want you to play for Riverdale High School, here's some ball caps and Riverdale T-shirts, we're looking forward and we are going to be happy to have you?

A. My understanding from the rules and the way that I -- the way that I enforce them is as long as it's the whole team, it's not a violation.

* * *

[1417]

Q. And that would be when you're talking to the eighth grade players before or after the games, correct?

A. Yes. That would be correct.

Q. All right. And in your deposition you talked about how you think that promotes harmony and good relations and let's the kids know, let's the kids know they are going to be coming to Riverdale High School, correct?

A. That's correct.

Q. And isn't it true that as metro athletic director you would encourage all your coaches to go out there and get involved in the seventh and eighth grade athletic programs?

A. I would and do encourage them to support their seventh and eighth grade athletic endeavors.

Q. And, in fact, you have told your coaches, have you not, that seventh and eighth graders that are coming in, you know, athletic programs, those are the high school coaches future, isn't that correct?

A. Absolutely.

* * *

[1418]

* * *

Q. Well, let's just take a quick look at your deposition. On page 111, at line 25, then going on to the next page.

Question: Can they -- can the high school coaches say, Hey, Joe, you know, you're a fine football player, you could really make a contribution to Hunters Lane. I hope you will come over next year.

And your Answer: Yes.

Do you remember saying that?

A. Don't remember saying that, it's been a while, but, you know, once again, it would be -- it would be appropriate, but I certainly wouldn't want one student complimented and not the other ones,

Q. All right. But let me ask you this way. If a coach did that, do you think that would be a violation of the recruiting rule?

A. No, sir.

* * *

[1419]

Q. All right. Now can a Hunters Lane coach, for instance, a high school coach, have face to face contact with middle school parents while the – before the middle school student is enrolled at the high school?

A. In the set feeder pattern?

Q. Yes, sir.

A. Yes.

* * *

[1420]

* * *

Q. All right. Now would you agree that the coach in your experience and based on your knowledge that that high school coach can mail letters to middle school eighth grade students and their families before they are enrolled in the high school and can communicate about athletic programs that will be available in the high school when they get there?

A. I would agree that that's -- that's that's done and is appropriate.

Q. And you would agree that based on your knowledge and experience that that is not a violation of the TSSAA recruiting rule?

A. That's my understanding.

* * *

[1432]

* * *

Q. Mr. Brunette, have you ever heard public school officials, coaches, teachers, refer to their students as or substitute athletes for our kids?

A. Yes.

Q. You have?

A. Yes.

Q. Have you ever heard public school officials or coaches or teachers complain about private schools and say, These private schools are beating us with our own kids? Or words to that effect? **[1433]**

A. Typically -- typically it would be more specific. They would name the school. But, yes. But they would name the school.

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

[Caption Omitted in Printing]

TRANSCRIPT OF PROCEEDINGS – BENCH TRIAL

VOLUME VI of Ten

BEFORE THE HON. TODD J. CAMPBELL,
U. S. District Judge

on December 18, 2002

* * *

[Testimony of Gerard Thomas Nebel]

[1471]

* * *

DIRECT EXAMINATION BY MR. BOOHER:

Q. Now, Mr. Nebel, as of right now, do you withdraw from representation of Brentwood Academy?

A. I do.

Q. In 1997, did you represent Brentwood Academy?

A. Yes, I did.

Q. And did you represent Brentwood Academy in connection with the allegations that are the subject of this lawsuit?

A. Yes.

* * *

[1473]

* * *

Q. And when you went to that appeal, did you know what charges Brentwood Academy was facing?

A. Well, I knew the information set forth in this letter of July 29th, but I didn't understand some of the specifics of the charges.

Q. Did you know what evidence that those findings were based upon?

A. No. Not all of it. I knew from TSSAA letters, some of the questions that they had asked and some of the statements in their letters. I had a general understanding of what their areas of concern were, but the specifics, you know, who at Brentwood Academy allegedly did what, there were still some questions that were unanswered from the school's [1474] perspective.

Q. Did you try and obtain that information, the who and the what from TSSAA?

A. Yes. For example, concern number six in this Exhibit 86, I tried to find out who at Brentwood Academy did what.

Q. Can you read concerning number six, please? Concern number six on page three of Exhibit 86?

A. Says, In talking with four student athletes from two different middle schools and six coaches from four different middle schools concerning contacts with student athletes in their schools, it was found that these contacts had come from persons connected with and persons not connected with Brentwood Academy. There is a recurring theme through all the interviews with students and coaches, the students are being singled out by someone based on athletic ability. It would appear to be of major concern to Brentwood Academy that the only two students from Neely's Bend School contacted and approved and accepted are two top athletes. Neely's Bend is 40 minutes away, the only student to go through the process from East Middle

School is out -- is an outstanding student. This should cause great concern on Brentwood Academy. The only student from Cameron to go through the process and be accepted is also an outstanding athlete. Three of the four would be among the best athletes in the metropolitan public school system at the middle **[1475]** school level. This is a violation of the recruiting rule. It is obvious that over and over we see persons exceeding what is normal and appropriate as well as treating athletes and prospective athletes differently than students who're not athletes. At some point examples one, three, four and seven of the question four above have been violated.

Q. And did the TSSAA tell you at which points those charges had been violated?

A. No. And I specifically asked them at the hearing in Fayetteville, I asked Mr. Carter to identify, first of all, whether students were being singled out by someone at Brentwood Academy based on their athletic ability, and at the hearing he told me yes.

And I told him, I said, Well, you have already told us we have got the burden of proof, so please tell me who at Brentwood Academy is doing so that we can defend ourselves, and I specifically told him otherwise we were in an impossible situation to meet our burden of proof.

And he refused to tell me who at Brentwood Academy was singling out students based on their athletic ability.

Q. Did you request information at that hearing from TSSAA in addition to what you have asked, did you ever request any written information from them?

A. At some point in time we did. I don't recall whether it was before the hearing or at the hearing, but we did request **[1476]** any investigative notes or any written evidence they had of violations.

Q. Prior to the hearing, were you given any of that type of information?

A. No.

Q. Were you given any of that type of information after

the August 13th Fayetteville hearing?

A. At some point in time during the discovery process it was furnished to us, but it is after the two hearings, the one in Fayetteville and the one at the Music City Sheraton.

Q. When you say the discovery process, are you referring to the discovery process for the federal litigation?

A. Yes.

Q. All right. Now did you receive notice from TSSAA about their finding of violations after the Fayetteville August 13th hearing?

A. Yes. I believe there is a letter dated --

Q. And the hearing in Fayetteville was August the 13th?

A. I think it was. I think we received a letter dated the next day.

Q. Okay. I would like to show you what's been marked as Exhibit 87. And, Ms. Ward, if you could highlight, blow that up a little bit so we can see it, please. Mr. Nebel, are you able to identify this document? **[1477]**

A. That's a letter that I reviewed at the time, it was sent by the TSSAA to Mr. Brown.

Q. And did this letter communicate to you the TSSAA's decision from the August 13th appeals hearing?

A. Yes. They communicated their findings to the school, yes.

Q. Aside from this letter, did you receive any other written information from TSSAA about their findings or the basis for their findings between the Fayetteville hearing and the time you had to defend Brentwood Academy at the final appeals hearing on August 23rd, 1997?

A. No.

Q. When you went into the final appeals hearing, did you have any other information aside from this letter, the July 29th letter and the two questionnaires from TSSAA, that they had provided to you?

A. I'm not sure I understand that.

Q. Let me ask it this way.

What information did you have at your -- were you -- did you have and were able to use as you went into the final hearing, what information provided by TSSAA?

THE COURT: Are you talking about from TSSAA?

MR. BOOHER: Yes, sir, just from TSSAA.

THE COURT: Okay.

BY MR. BOOHER: **[1478]**

Q. What information had they given you so you would know what charges BA faced and what charges did they give you as you went in to defend them at the final appeals hearing on August 23rd?

A. Just the correspondence that had been addressed to the school, to Mr. Brown at the school, from the TSSAA.

Q. All right. Specifically, do you recall what those pieces of correspondence were?

A. They were either two or three letters before the August 13th hearing I believe, and then the letter dated August 13th, 1997.

Q. All right.

A. So by the time we walked into that hearing at the Music City Sheraton, we either had four or five pieces of correspondence from the TSSAA.

Q. Okay.

MR. BOOHER: Your Honor, may I have a moment?

THE COURT: Yes.

(Pause in proceedings.)

BY MR. BOOHER:

Q. Now, Mr. Nebel, I would like to show you a document that has been designated as Plaintiff's Exhibit 96. Mr. Nebel, can you identify this document?

A. Really I can't.

Q. Okay. Have you ever seen this document before, to your **[1479]** knowledge?

A. Not before today, that I'm aware of. There are so many pieces of paper that were produced in the discovery in this litigation, it's possible that I saw it, but I don't recall it.

Q. Let me ask the question this way, Mr. Nebel.

Did you ever see this information before the conclusion of the final appeals hearing in Fayetteville?

A. No. The final appeals hearing I think was at the Music City Sheraton.

Q. Yes, let me rephrase that.

Did you ever see this before the final appeals hearing at the Music City in Nashville?

A. No.

MR. BOOHER: Your Honor, I ask this be marked for identification purposes as, I guess, whatever the next exhibit number is.

THE COURT: You're going to have to tell me, you're the one that numbered them.

MR. BOOHER: 152.

MR. COLBERT: It's premarked as Plaintiff's Exhibit 96, wasn't it? Isn't that what he said?

MR. BOOHER: Then I would like for it to be marked for identification purposes.

THE COURT: 96? **[1480]**

MR. BOOHER: 96.

THE COURT: Can you describe it for the record so I know what it is?

MR. BOOHER: Yes, Sir.

THE COURT: Just generally.

MR. BOOHER: Gene Menees' handwritten notes.

THE COURT: That's fine.

BY MR. BOOHER:

Q. Now I would like to show you what's been previously been marked as Plaintiff's Exhibit 95.

And, Mr. Nebel, can you read the statement that's on the first page of that?

A. This is a four-page document, and on the first page it has the initials GM, and the words Notes from eight slash 13, and it looks like H-R-G period.

Q. All right. And do you recognize this document? Can you identify this document?

A. No. I don't recall seeing it before.

Q. And had you seen this document at any time prior or during the final appeal in Nashville, Tennessee, on August 23rd?

A. No, I'm certain I did not see it before those hearings.

Q. Okay. Are you aware of anyone from TSSAA in that final appeal who has the initials GM?

A. Gene Menees, but -- you know, there were a number of **[1481]** different people there from the Board of Control and, you know, other administration of TSSAA.

Q. Okay.

MR. BOOHER: Your Honor, I ask that Exhibit 95 be marked for identification purposes.

THE COURT: All right. It will be marked as 95 for identification.

MR. COLBERT: Your Honor, so the record's clear, on the first page of Plaintiff's Exhibits 95 and 96, what's been copied is a post-it note on each one that was in my handwriting where I identified what these documents were when I produced them at the request of the plaintiff.

THE COURT: All right.

MR. COLBERT: That's my handwritten GM notes from May 23rd hearing and GM notes from 8-13 hearing on a post-it note so I identified what they were.

THE COURT: Thank you.

BY MR. BOOHER:

Q. Now I would like to show you what was previously marked as Plaintiff's Exhibit 94 for identification purposes. Can you just read the statement that's on the front, I believe?

A. Right. This is a two-page document and on the front it says GM notes to, that's t-o, self, preceding decision-making M-T-G period.

Q. And did you ever have the opportunity to see any of this **[1482]** information prior to defending BA at the final appeals hearing or during the final appeals hearing in Nashville?

A. No.

MR. BOOHER: Your Honor, I ask that that be marked for identification purposes as well, Exhibit 94.

THE COURT: All right. That will be marked as 94.

MR. COLBERT: Again, Your Honor, the first note is my handwriting, my note to identify for the benefit of the plaintiff's attorneys what this was.

THE COURT: Okay. Thank you.

BY MR. BOOHER:

Q. Now I would like to show you what's previously been marked as Exhibit 84, Plaintiff's Exhibit 84. Do you recognize this document?

A. Yes.

Q. Was this one of the communications that you were referring to that you had received or the school had received, Brentwood Academy had received, from TSSAA prior to the ultimate finding of guilty in Nashville on the 23rd of August, '97?

A. Yes. This is one of the documents that they received and that I took a look at before the hearings.

Q. I would now show you what's been previously marked as Exhibit 85. Do you recognize that document, Mr. Nebel?

A. Yes. **[1483]**

Q. Can you identify it to the court?

A. Yes. This is the -- this is actually the first document that I was shown. It is multi-page document from the TSSAA to Mr. Bill Brown, the principal of Brentwood Academy, and I believe it was this document that led Mr. Brown and Mr. Flatt to call me.

Q. And was this one of the documents that you were referring to that you have been provided by TSSAA?

A. Yes.

MR. BOOHER: Your Honor, may I have a moment?

THE COURT: Yes.

(Pause in proceedings.)

MR BOOHER:

Q. Mr. Nebel, based on all the information that was provided to you by the TSSAA about the allegations and the persons accused by TSSAA at Brentwood Academy, were you able to know what the basis of the earlier findings were and who they were accusing of doing what at the final appeals hearing so you could defend the school?

A. To some extent yes, but to a large extent, no.

Q. Why not?

A. Well, the example I gave you, for example, concern number six in the letter dated, I believe, July 29, 1997, if someone at Brentwood Academy was accused of singling out prospective student athletes, and if the TSSAA was going to **[1484]** regard this as a violation of the rules, and if we had the burden of proof to show that we didn't violate the rules and we were told at those hearings then we needed to know who did what or who was accused of doing what. And we couldn't get the answer to that.

The information that they did make available to us, we tried to meet that head on with the exhibits we presented, but there were other allegations that were not spelled out to us and those allegations we were not able to meet head on because we didn't know who was accused of what.

Q. At the final appeals bearing, did you offer to call Bart King as a witness?

A. My recollection is that I did. Without having to review that transcript, I believe I did.

Q. Okay.

A. I know we submitted an affidavit at some point in time from Mr. King, and I think, but I'm not sure, but I think along with that he offered to call Mr. King.

* * *

[1491]

Q. And you knew before you went to this hearing in Fayetteville on August 13th of 1997 that the activities of Bart King were a concern to TSSAA, didn't you?

A. Yes. I knew that TSSAA was concerned about Mr. Bart King.

Q. Okay. And you knew before you went to the hearing on August the 13th, 1997, that the free admission given to some student athletes who came to a football game with Kevin Armstrong was a concern of TSSAA, didn't you?

A. I knew of that allegation, yes.

Q. Okay. And, in fact, before the hearing on August 13th, 1997, you sort of commandeered the effort to put together this roughly two-inch thick volume of exhibits that's been labeled Plaintiff's Exhibit 133 A, right?

A. Yes.

Q. And you had -- you had enough information before you ever got to the August 13th, 1997, hearing to know that you needed to get sworn statements from Jesse Kellogg, Jermonde **[1492]** Davis, Jacques Curry and Glean Eddy, right?

A. Yes.

Q. You had enough information to know that there were some potential problems involving the recruiting rule allegations surrounding those kids, right?

A. After -- I knew that the TSSAA saw those as potential problems, yes.

* * *

[1494]

* * *

Q. All right. And then if we go on over under tab number nine you had enough information on August 1, 1997, to interview -- to know that Jacques Curry was one of the students you needed to examine, right?

A. Correct.

Q. And on page ten of that examination you had enough information as of that date to know that his relationship with Bart King was one of the things you needed to ask him about, right?

A. Yes.

Q. Because that was one of the things that TSSAA was [1495] concerned about, right?

A. Correct.

***

[1498]

***

Q. I would like to show you what's previously marked as Exhibit 93. Do you recognize this document?

A. Yes.

Q. Can you describe it for the court, please?

A. These are some notes that we obtained from the TSSAA after the two hearings, the one in Fayetteville and the one at the Music City Sheraton.

Q. And what are these notes about?

[1499]

A. These were notes that were the investigative part of the investigative file that the TSSAA had and that, as I say, it was produced to us after the hearings.

Q. When you were defending Brentwood Academy, did you have the benefit of these notes?

A. No. Not at the two hearings.

***

[Testimony of Ronald Lee Carter]

[1556]

Q. * * * * Well, why wasn't it reasonable for Coach Flatt and Nancy Brasher to conclude that if it's permissible to participate in spring practice, that it must be permissible to communicate about spring practice?

A. I think right there is exactly, red flags start going up. I think that's what Mr. Rogers said here the other day. The minute you start sending out communications dealing with sports, I think with school people that's when flags ought to go up. I can't speak for Ms. Brasher in terms of -- but I can tell you from the context of dealing with people in athletics, that's the first antenna or flag that would hit.

Q. To summarize your analysis of this spring practice letter, who sends out the letter, there are several factors, but who sends the letter out is an important factor that is considered?

A. Yes.

Q. In looking at it.

A second important factor is what the message is, what the content is, what is in the letter, right?

A. No question.

Q. And the third thing is the recipients of the letter, who does it go to, who gets it. Is it just select athletes, is it everybody in the school or who is it. That's another factor?

[Testimony of John E. Roberts]

[1598]

***

Q. Now, Mr. Roberts, have you formed an expert opinion as to whether high school athletic recruiting should be prohibited?

A. Yes.

Q. And we're going to go over the basis for those opinions in a moment, but could you please provide the court with a brief overview of those opinions?

A. Rules that restrict recruiting of high school students for athletic purposes serve a variety of purposes. The **[1599]** over-arching purpose is to promote a proper perspective which is one of the athletic program being

subordinate to virtually everything else that goes on in school, certainly the academic mission of the schools.

Rules that prevent athletic recruitment also tend to prevent exploitation of students when the door to the school opens to athletic recruitment, as does the door to exploitation.

Rules that prohibit recruitment for athletic purposes also tend to promote and provide a level playing field and without a level playing field in educational athletics the gap between the haves and the have nots widens. There's an arm's race in order to keep up with the school down the road, which is not healthy. We're undermining the mission of educational athletics.

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[1605]

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Q. Mr. Roberts, let's move to the second point or actually the third, the point of your testimony, the maintenance of a level playing field.

Why is it important that student athletes get the opportunity to compete on a level playing field?

A. If you do not have a level playing field, the competition cannot be fair, you can only have hard feelings **[1606]** result. All who participate want a fair chance to succeed, not a guarantee of success, but a reasonable chance to succeed. And that's going to show up on a number of levels. The individual student athlete wants a fair chance to make the team, not a guaranteed spot, but a fair chance to make the team, and does not want to be bumped out, does not deserve to be bumped out or off the squad or out of a starting line up or out of playing time by someone recruited for athletic purposes to the program.

The team doesn't want to be humiliated week after week by teams that are much more loaded in talent and powerful. If a team loses all the time, and loses by

discouraging margins, then participation will drop. There won't be as many youngsters coming out for the team. When that happens, schools lose a tremendous vehicle, sports, for reaching and motivating young people and for teaching them in practical ways about team work and hard work and sacrifice and discipline and leadership and sportsmanship and all of those things that can be good in sports.

And if the school loses that element, loses the participants, then the community isn't going to rally around, isn't going to come to the games, fewer participants you have, the less school spirit you have, the less community involvement you have and schools become much weaker. And you don't have the Friday night game or the [1607] Tuesday night game as a rallying point to communicate to the community about what's going on in the school, not just in sports, but in all aspects of the school's life.

Q. All right.

A. Finally, an organization like the Michigan High School Athletic association, Tennessee Secondary School Athletic Association, the schools corporate lead in the state have an interest in this level playing field. If it tilts too far, if the gap between the haves and the have nots gets too wide, then there's not going to be a place in the organization for one end or the other of that spectrum.

I really believe that rules that promote a level playing field promote having all of the member schools come together for the common good. When the level playing field tilts, and the gap widens, the arms race to recruit is on, then there's a division in the organization and the organization can't accomplish good things for schools and people. I really think that rules that restrict athletic recruiting deescalate the arms race and provide a place for all kind of schools in the state organization, provide a place, frankly, for schools like Brentwood Academy, without a recruiting rule there wouldn't be a place for a school like that.

* * *

[1678]

* * *

Q. Now this community rallying point, what do you mean by that?

A. The sports events of our high schools are a source of pride, a source of exchange of communication, both communication about what's going on in the school, what's going on in the community. It's a gathering place. Schools take -- communities take a lot of pride in their sports teams. If a school team never has success, participation declines, as participation declines, so does the community rallying point, fewer people come. School and community lose support. There are schools that live and relive state championships won. There are schools that bitterly, bitterly resent championships lost. It's -- high school sports, educational athletics is a local phenomenon, it's pure, it's [1679] wholesome, hometown, sometimes corny thing. And --

Q. But it's a very real feeling, isn't it?

A. Yes.

Q. And if an athlete, really a good athlete, local boy or girl, and they are really good and they grow up and they are successful athletes, the community at the local school is proud of them and they rally around them, right?

A. Yes.

Q. Yes. And it develops a sense, have you observed this in Michigan or Tennessee or wherever you have been, that it develops a sense of ownership of these children, and you call them, not literally ownership, but they call them our kids, these are our kids, you've heard that sort of expression?

A. Sometimes you hear that, that's right.

Q. These are our kids. And there can develop the resentment also there if somebody comes in and recruits those children away from the local public school, for academic or athletic reasons, then the local public school doesn't like it, do they?

A. They may not.
Q. Especially if they are really good athletes, right?
A. Correct.

* * *

[Testimony of George Sage]

[1727]

* * *

Q. And I think even in some of your writings you have advocated that more rigorous academic standards should be demanded of student athletes, right?

A. Yes. Yes, that's correct.

Q. And that you have been critical of state associations, high school athletic associations that only require a passing standard, that students have Ds in classes in order to be eligible, right?

A. Yeah, I think that's a minimum bottom. I don't think that's very impressive to have that as a standard.

Q. All right. Are you aware that TSSAA, that's all they require?

A. No.

Q. Okay. If you will look at -- well, I won't take the time.

If I represent to you that's what the TSSAA academic eligibility requirements are, would you agree with me that they should, if we're looking to subordinate athletics to academics, we ought to raise those standards?

A. Well, that would be my preference, yes.

Q. Okay. Now your report mentions enrollment based classification systems as the primary means for maintaining a level playing field, right?

A. That's what all of the states have established. **[1728]**

Q. Now I want to make sure I understand what you

mean when you're talking about an enrollment based classification system. Would you describe it for me quickly?

A. Yes. Schools are -- schools are put together, you know, organized into conferences on the basis of the enrollment at the school. And then -- in different states they use different terminology, but most states it's like the smallest schools are like one A and two A and three A and four A. And works up. But within each category there is an upper and a lower level of enrollment in the school.

Q. All right. So that large schools are playing large schools and small schools are playing small schools?

A. Yes.

Q. Now why is it necessary to break schools out in that way? What's the principle behind it?

A. Well, the principle behind it is that schools with common enrollments will over time have common resources at their -- athletic resources at their disposal.

* * *

[1732]

* * *

Q. All right. Now in your experience, or in your opinion, how do we go about measuring whether we're achieving competitive equity?

A. Well, I think that's a good question. And I think one way is to look at the performances of the teams and the various teams and how they are doing over a series of years. And I would look at not just one team, but the entire scope of the athletic program and how other teams are doing at a given school over a period of years.

Q. So if I understand what you're saying, the unit of analysis really in trying to decide whether we're achieving competitive equity is the school and not the students so much, right?

I mean you're focusing on how the school is doing in its

competitive effort as opposed to how the individual students are doing? [1733]

A. Well, in this particular case, because we are trying to equalize resources.

Q. Okay. Between schools?

A. Yes. Between schools, yes.

* * *

[1736]

* * *

Q. Assume you're a parent of an eighth grader and you're looking for a high school and you bump into the coach for Brentwood Academy in the grocery store, and he comes up to you and says, Mr. Sage, I hear that Mr. Sage Junior is a terrific athlete and we really hope he is going to apply and come to Brentwood Academy.

Do I understand what you're saying here to mean that because of the effect that kind of statement can have on you as a parent and on your son in your hypothetical that coaches shouldn't be allowed to do that?

Shouldn't be allowed to approach and make those kind of communications?

A. Well, I think -- I think it's impinging upon the undue influence.

Q. Is that a no?

A. Is that a no?

Q. No, is that a no, sir? It's kind of a yes or no question.

A. I see. Okay. Restate it. I'm sorry.

Q. Do I understand you to be saying that because of the effect of that kind of statement of the parent and the student that coaches shouldn't be allowed to approach you in the grocery store and say these kinds of things? [1737]

A. No, they shouldn't.

Q. Okay. When you were drafting your report, did you make any distinction in your mind when thinking about

recruiting activities, did you make any distinction in your mind between sort of speech and conduct?

Do you understand what I mean by that?

A. I think speech and conduct -- speech is a form of conduct.

Q. Okay. Well, let me give you an example. Do you think there's a distinction between, in terms of recruiting, between my coming up to you and saying, I'm a Brentwood coach, and I come up to you in grocery store, like I said just a few minutes ago, and I just mentioned to you, speak to you and say, we think your son would be a great athlete at Brentwood Academy, we would love to have him, is that different from my talking to you in the grocery store and giving you an unmarked envelope full of money?

A. Oh, yes. Sure.

Q. Okay.

A. Yes. One is much more serious.

* * *

[1757]

* * *

Q. Right. There were certain aspects of the contents of the letter that caused concern for you?

A. Sure. Sure.

Q. And, of course, the content of the letter is meaningless unless it has an impact on who gets it, right?

A. I think the person who sent the letter, that communication that is expressed here, the way the sentences are put together, the meaning that they convey, and who the recipients of the letter are, are all factors.

Q. All right. You have been in the courtroom all day today, right?

A. Yes.

Q. Were you here earlier today when Mr. Carter testified that this spring practice activity that's the subject

of this letter was a permissible TSSAA activity at the time?

A. Yes. I know it was a permissible activity, yes.

Q. In fact, what he said was that the eighth grade students that at the time this letter was sent out, the TSSAA policy was that eighth graders could go to spring practice at any school they wanted to, did you hear that?

A. Yes. That's not the point.

* * *

[1760]

* * *

Q. All right. Well, what if this letter, this exact letter, went to parents, and not to students, just to the parents of the 12 boys?

A. Well, then it would be a same violation because the rule reads that students, parents, et cetera, undue influence for athletic purposes.

Q. You told me a minute ago that one of the things you have to look at in order to determine whether it was undue influence was the effect it had on the folks that got it, right?

A. Yes.

* * *

[1772]

* * *

Q. So you would agree with me then that letter is getting pretty close to undue influence if not being undue influence?

A. I would say that, yes, just as you describe it, but as I understand the pattern, or not the pattern, but the process that is used, is that you need to look at the totality.

Q. All right. The totality of circumstances. Before you

make an actual --

A. Yes.

Q. All right. Well, you would agree with me though one way we need to go about trying to make that assessment, the total of the circumstances' assessment is by looking at the content of the letter, right?

A. Yes.

* * *

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

[Caption Omitted in Printing]

TRANSCRIPT OF PROCEEDINGS - BENCH TRIAL

VOLUME VII of Ten

BEFORE THE HON. TODD J. CAMPBELL,
U. S. District Judge

on December 19, 2002

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[Testimony of Ronald Lee Carter]

[1920]

* * *

Q. You're only a phone call away, right?

A. Yes, sir.

Q. The problem is that if a school calls you and orally asks you a question, they cannot rely upon what you tell them orally, can they?

A. No, sir.

Q. And if you don't put it in writing, you're not bound by it, right?

A. I don't think of it in terms of bound. But I think of it in terms -- the term we use is that's what will give them the greatest picture because so many times people will ask a question over the telephone and doesn't have all the information in it, and then they will ask if the student meets the age rule, is he eligible, and then I might respond, yes, if he is not 19 on or before August 1st, but then people many

times take that out of context and don't remember the other rules.

So we ask them to put it in writing so that they will have something documented and something documented at our place.

* * *

[Testimony of Thomas McMillen]

[2027]

* * *

Q. Now in your comments you have objected to speech if it resulted in outcomes that you don't approve of,

A. I didn't specifically say that. I said --

Q. You don't like -- you don't like --

A. I didn't say that. I said, what I said was that --

Q. Let me --

A. -- this is not about speech.

Q. Let he ask you the question.

A. It's about time, place and manner. It is not about speech, per se.

Q. Let me ask this. Would you include in your prohibition the no recruiting ban a ban on truthful speech?

A. I would not -- again, I'm not going to answer that question because my position is that athletic recruiting is about undue influence, period.

Q. Isn't your concern really, Mr. McMillen, that the impact that the message is going to have in the recruiting contact on the students who receive the communication, that's your concern, isn't it?

A. That and the concern and the influence on the parents.

* * *

[Testimony of Ronald Lee Carter]

[2047]

* * *

Q. All right. Now let's pull up the Warrior letter, which is 104. Exhibit 104. Mr. Carter, can you see that on the board? **[2048]**

A. I can now.

Q. All right. Is this Warrior letter written by Coach Gary Rankin of the 1995 Riverdale Warrior football team in July before the season, is this letter undue influence under Section 21?

A. I can't, you know, just look at it, I mean you would have to have, again, all the information, all the facts involved, the things that started, who's it sent to, obviously it's from Coach Rankin, who's it sent to, you know, what are the situations. You would have to have all of that. But obviously there are some things in that immediately flags would go up. There are some things there that would say, Boy, there's a flag up.

Now I don't know that you necessarily say there's a violation until you got more information.

Q. All right. What are the flags, quickly?

A. Well, the Warrior. You know, I think the first thing again, it starts, not looking at the letter, but it starts with information you would have to have, who's it sent to? What's the circumstances? You know, give me all of the information. How is it occurring? Then you would start with, okay, now let's look at the things that are in the letter.

Now you want me to look at the letter?

Q. Yes. The first question is who sent it. The second **[2049]** question is what does the communication say.

A. Who is it going to?

Q. What were the circumstances and the third thing is who was the letter going to, right?

A. Yes. And I think -- I mean those are things that just

come to me immediately. As you got into the conversation with the school people, there might be other things that would come up, but that's just on first blush.

Q. All right. I understand that.

This is from Coach Gary Rankin of the Riverdale High School team and that would be a red flag, number one, wouldn't it?

A. Yes, sir.

Q. Red flag number two is it is going out to the students before the enrollment date, right?

A. Yes, sir.

Q. Under the TSSAA rules?

A. Yes, sir.

Q. Which is the attendance day plus three, right?

A. That's correct.

Q. Okay. And the third thing that you pointed out is it's addressed to Warrior, in caps, exclamation point, which is this effort to embrace?

A. Reaching out because the students aren't going to become enrolled and treated as a student at that school until they **[2050]** have officially gone through three days of school or three days of football practice, whichever one comes first. In this particular case I think it's the football letter.

Q. What about the letter or red flag or violations of Section 21?

A. Well, you know, then I think it's just sort of that it's totality. I would have to see.

Q. Let's read it sentence by sentence.

A. I would like to take this opportunity to welcome you to the 1995 Riverdale Warrior football team.

Obviously the flag would come because here we go again in the total context because the students are not students at Riverdale school yet.

Q. Okay.

A. We're looking forward to the upcoming season with great enthusiasm and high expectations. Our opening game with Smyrna is a little over eight weeks away and we must

be totally committed to the task ahead of us. The Riverdale High School --

Q. Let's talk about the second paragraph. Is there anything in the second paragraph that is a red flag for undue influence?

A. Well, you don't see the personal reaching out there as much. I think the pronoun changed to we are looking forward to and all that kind of things from the standpoint again **[2051]** it's within the context of what's there. But, you know, I don't see it just jumping like the personal pronoun that when you start speaking to kids individually it comes out a lot, but, again, there's some concerns I guess you would say as you start through that paragraph there.

Q. It starts we are together, we're looking forward with great enthusiasm and high expectations. You're a part of us, opening game is going to be a challenge. We have to be dedicated. It's kind of pumping up the team?

A. You would have to -- again, it's like you would say you have to look at everything. But could it, could be a possible violation, yes.

Q. All right. What about paragraph three?

A. Riverdale High School's motto is commitment to excellence. That is what we strive for this season. With your commitment and dedication, we will achieve our goal of being the 1995 region -- I guess that's region four of region five A champions on the way to the state championship.

Q. What about that paragraph?

A. I think the only thing that sort of jumped at me when I read it when you get into the second sentence, Your commitment and dedication, you know, the your there.

Q. Okay. Paragraph about the physicals?

A. Monday, July 4th, Dr. Johns and staff will give **[2052]** physicals free of charge from five to eight at Riverdale. There's nothing there. That's just information.

Q. Is it okay for the school to give free physicals to the students?

A. Yes, sir.

Q. Is that not an inducement?

A. No, sir, it's done all over our state. There are very few schools -- I can't even think of a school right now that doesn't have -- that doesn't have some set up where physicals are given free.

Q. Free physicals are okay, not a violation?

A. Not a violation.

Q. That's not in the rule?

A. In what rule?

Q. In Section 21.

A. No, sir. No reference to physicals in Section 21.

Q. All right.

A. Please complete the enclosed form and bring up it with you the day of physicals.

I think that only one in the context again that you would have to have more information on who's it going to and so on.

Report directly to Riverdale High School locker room, all players are --

Q. That's pretty mandatory, isn't it? If I have learned **[2053]** anything in this case, report directly to the Riverdale High School football locker room?

A. Yes, sir.

Q. Thou shalt do that. That's a red flag, isn't it?

A. Yes. I think that's -- let me go back.

* * *

A. Again, I think you would have to look, you know, you got to get it all in the context of all the information you would get when you were talking with someone.

Q. All right.

A. Then all players will report to practice on Tuesday July 25th, 1995, at four to eight. I don't see that in any major thing, the last statement. I think that's very much like the first or the second paragraph that when the physicals will be.

Q. What about, See you soon, Coach Rankin?

A. Again, I think it could be referencing back to the total thing of what have we got, where is it going, all those kinds of things. **[2054]**

Q. All right. Every school in the state sends that letter or a letter like that out, don't they?

A. No, sir.

Q. This is very unusual?

A. I don't know. I mean I don't put it context of unusual, but I would say, you know, I can't --

Q. Isn't this normal and appropriate?

A. Is that letter normal and appropriate, not necessarily, depends on so many factors.

Q. Okay.

A. I mean that's -- I stated. You have to have more information.

Q. All right. Would the Warrior letter be a Section 21 violation if it were sent to tenth graders, just the past players, ninth graders who were, in fact, enrolled at Riverdale High School?

A. Wouldn't see it as much of a problem.

Q. Why not?

A. Well, if they are in school there, they have been on the Warrior football team the last year, you know, I think again, you would look at it as total context. It went to all the kids on the Warrior football team last fall that was at Riverdale, then it doesn't rise to the level -- I think as you start --

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

[Caption Omitted in Printing]

TRANSCRIPT OF PROCEEDINGS – BENCH TRIAL

VOLUME VIII of Ten

BEFORE THE HON. TODD J. CAMPBELL,
U. S. District Judge

on December 20, 2002

* * *

[Testimony of Ronald Lee Carter]

[2105]

* * *

Q. Now when the transcript says they are subjective, you were referring to the terms normal and appropriate and the terms undue influence, weren't you?

A. Well, from just what I have read, I mean I -- I really would want to read the total thing. But I mean, yes, sir, that would have been the terms I'm referring to. I mean subjective in the sense that I've got to take, in this particular case, because I'm sitting in the chair of the executive director, the executive director has got to take evidence, make decisions, and that decision is subjective in terms of that's the person's going to have to make it. That's my reference to subjective. **[2106]**

Q. Okay. Now, Mr. Carter, you heard Morris Rogers the other day, the Board of Control member, saying that --

and he said this a number of times -- you know, if you have got a question about the recruiting rule or any other rule, really, but we're talking about the recruiting rule here, the best thing to do is to call Mr. Carter, he's only a phone call away. You remember that, words to that effect?

A. Yes, sir.

Q. All right. And you have told school people all over the state that if there are any doubts, any questions in your mind about the interpretation of the rules, pick up the phone and call, --

A. Yes, sir.

Q. -- right?

A. Yes, sir.

Q. And you answer those telephone calls, right?

A. Yes, sir.

Q. Okay. And you will give advice over the telephone, you will say this, or that or whatever, right?

A. Yes, sir.

Q. Okay. Now none of that advice is binding on you, right?

A. Yes, sir.

Q. And the school people know that, don't they?

I mean they know that you try to tell them what's correct, you know, in the telephone conversation, you try to **[2107]** give them good advice, but it's really not a binding, official binding statement on behalf of the TSSAA, the only way they get that is if you write them a letter and say this is, you know, what it is, is that right?

A. Well, I'm not sure I understand, you know, what the terminology of binding is, but --

Q. Suppose Brentwood Academy --

MR. COLBERT: Your Honor?

THE COURT: He's trying to clarify. Go ahead. He said didn't understand.

MR. BARFIELD: Let me try to clarify it.

BY MR. BARFIELD:

Q. Let's just assume that Coach Flatt had, before he

sent the spring practice letter out, he said, Oh, goodness, I got a question about this, this might be a violation of the initial contact rule, the no coaching contact rule, I better call Mr. Carter and find out. He picks up the telephone and says, Mr. Carter, can I send this spring practice letter out?

And you say whatever you say, Yes, you can, or, No, you can't.

The question is, is that binding on you?

Will you adhere to that or can you change your mind?

A. I don't know that I see it from the standpoint of **[2108]** changing my mind. I think I would start my first statement, the only thing that's binding is the rules.

Let me use an illustration because I do this all the time with schools.

Q. Okay.

A. Let's say that you call me about a student's birth date, okay? And you give the information to me and I go brain dead, and I give you the wrong answer.

Q. Okay.

A. And I tell you he's eligible, he's 20 years of age. And let's say you literally wrote the question back and again I somehow go brain dead, and give you a wrong thing.

Q. Erroneous information.

A. Okay. If you have played an ineligible player, by the rules you're still going to have to forfeit ball games because the school is responsible for adhering to the rules.

Q. Okay. Now that's a pretty clear example of -- the age limit rule is very different than the recruiting rule in terms of discretion, wouldn't you agree?

A. In terms of --

Q. Discretion?

A. Yes, sir. Yes, sir.

Q. The age limit rule is a good example of a rule that is what lawyers call a per se rule, that's a rule that, you know, if you're 19, you're over 19 as of such and such a **[2109]** date, you can't play, right?

A. That's correct.

Q. Okay. Take a look at the -- isn't any discretion involving that, you take a look at the birth certificate and the date that's in the rule and you make the decision and there's no discretion at all, right?

A. Yes, sir. We have two rules like that.

Q. Yes. Okay.

Well, what's the other one?

A. Semester rule.

Q. Semester rule, okay.

But this recruiting rule that we have been dealing with here is much, much different than those clearly specific, what I call, per se rules, right?

A. Yes, sir.

Q. Now on these discretionary rules, like the recruiting rule, if Coach Flatt had called you up and said, you know, Can I send the letter out, the spring practice letter out?

And you said, Yes, I think that will be fine, go ahead and send it out.

And he had sent it out to the boys, and, you know, then an investigation occurs and you say, Oh, goodness, I made a mistake, I shouldn't have told you that. This violates the undue influence rule.

And the fact that Coach Flatt relied on this oral **[2110]** telephone conversation in sending that letter out doesn't bind you to that position, does it?

You could still have the discretion to find that Coach Flatt violated Section 21 by sending the spring practice letter out, even though you had told him it was okay, right?

MR. COLBERT: Objection. It's irrelevant under the Sixth Circuit's decision.

THE COURT: Mr. Rogers put it into relevance.

Go ahead.

THE WITNESS: Yes, sir. I mean, again, it's the total thing, you know. You take all the information and then you would make the determination based on what you're relating the conversations that occurred, all of that would factor into the decision.

But the answer to your question, I'm still going to have to make a decision after all that's over.

BY MR. BARFIELD:

Q. All right. And you make a decision depending on all the circumstances contrary to the oral advice that you had given just in the hypothetical there? Are you going to --

A. I -- I mean it's --

Q. I guess the question is really, you have the discretion to make another decision that is contrary to what was apparently erroneous oral advice over the telephone, right? **[2111]**

MR. COLBERT: Your Honor, just for the record, I would like to make a standing objection on the same basis previously.

THE COURT: All right.

THE WITNESS: I guess theoritically, you know, just – or hypothetically, I guess, yes, you could.

* * *

[2136]

* * *

BY MR. BARFIELD:

Q. Exhibit 83. Talk about Exhibit 83. So we have the Hathaway, John Trotwood Moore situation that occurs in January of '92. And in April of '92 we have the Harpeth High situation. This is Exhibit 83.

Do you remember this, Mr. Carter?

A. Yes, sir.

Q. You remember this; but you don't remember the other one?

A. Well, I just remember when- the reference you made to Harpeth High because it's been mentioned a couple times, it just refreshed my memory there.

Q. All right. Good. Let's pull up paragraph one.

Now you write to Bill Brown, April 29th of 1992, that

this is in regard to a recent letter that I received from administration of Harpeth High School. The letter indicates that one of their staff members was at a Little League baseball game where a parent informed him that they had received two telephone calls from Carlton Flatt concerning their son, who is a fifth grade student at Kingston Spring Elementary School. According to the information given to the individual staff member, Coach Flatt had stated to the parents that their son's junior pro coach had recommended him as a football player. The parents **[2137]** were very flattered, particularly because they had made no contact with Brentwood Academy prior to the two telephone calls. In a telephone conference with Coach Flatt, he relates to me that he had called because the name was given to him by a former player at Brentwood Academy. Mr. Flatt stated that he told the parents they had been recommended as a family, that would be the kind in which Brentwood Academy would be interested and he would like to sit down and tell about Brentwood Academy.

Did I read that correctly?

A. Yes, sir.

Q. Okay. The next paragraph. Let me first make certain that we all understand. This is not a violation of TSSAA rule, right?

A. Yes, sir.

Q. As I'm sure you are aware, TSSAA rules state that these type calls would not be made at the seventh grade level or above. I read that correctly?

A. Yes, sir.

Q. Okay, the next paragraph, this is where you write, it is, however, a symptom of a much greater problem. The spirit and intent of the rules are very definitely violated in my opinion.

Now you're talking about the recruiting rules, right? **[2138]**

A. Yes, sir. Well, no, sir, I think it's the spirit -- I think it's the spirit and intent of all of our rules.

Q. All right. All the rules?

A. All the rules and what we are there for in terms of athletics.

Q. The obvious indication to the parent is that the call would not have been made if the student were not a football player. Again, we make football bigger than life, we are looking for solutions, we are a part of the problem.

That's what you wrote, didn't you?

A. Yes, sir.

Q. And you didn't do anything about sanctions of Brentwood Academy, because obviously it wasn't a violation there, right?

A. That's correct.

Q. All right. Now this was a coach initiating contact with a fifth grader, right?

A. Yes, sir.

Q. Or parents of a fifth grader, right?

A. Yes, sir.

Q. Okay. And that's the same kind of communication that we're talking about in this lawsuit, right? It's school initiated targeted communication?

A. Yes, sir.

Q. If Coach Flatt had done that to a student that was not **[2139]** in the feeder pattern, he would violate Section 21?

A. It doesn't have anything to do with feeder pattern.

Q. He violated it anyway, right?

A. He could violate Article II, Section 21, if there was undue influence.

Q. All right. Also violated, if he makes initial contact, with the parents?

A. Again, --

Q. Without them calling, right?

A. Again, you would have to take all of the whole thing into what's turning around, what's taking place. You got to take all the information and put it together, but I think the statement you have made, you start -- the flag starts going

up.

* * *

[2146]

* * *

Q. But the contact between the AD-coach and these kids is a violation of initial contact, isn't it?

A. Again, the initial contact is just one of the questions that -- the key is back to Article II, Section 21. What I'm going to have to do is determine whether all the factors that are there, I'm going to have to make a determination has there been undue influence.

Q. All right, I know that. But if the coach, the coach, if the coach contacts these kids not in the feeder pattern, it's also a violation of the no coach contact example, isn't **[2147]** it?

A. We don't have a no coach contact rule.

Q. Well, you did the first time you were over here in the case. You're saying you don't now, right?

A. We have a rule that states what it says, Article II, Section 21.

Q. All right. I'm talking about the commentary. It's a violation of the commentary, the no coach commentary for the athletic director-coach to contact these students too, isn't it?

You got a violation of initial contact and you have got a violation of the no coach contact example, don't you?

A. I do not -- I don't -- I just don't deal in the same frame of reference you're talking about.

Q. All right.

A. Initial contact is obviously a flag that goes up.

Q. All right.

A. But it -- you would then take it into all of it and your determination at the end is do you have a violation of Article II, Section 21.

* * *

[2148]

* * *

Q. The example, the free tickets is a potential violation of example number seven, and transportation is a violation of whatever the number is, right? Or potential violation?

A. No, sir. They are not violations of questions. You don't have violations of all of these questions and answers. All of those in number four, the question you're referring to, and that list are guides. You would take that and put that all into the context of what has occurred and then you got to make a determination, have you got a violation of the undue influence rule. There might have been transport -- I mean you do literally create the scenario that you have done and walk down it and there would be three sons and we have had that.

* * *

[2149]

Q. All right. Okay. Given the facts that I have given, is this a violation of Section 21, recruiting rule and the commentary?

A. I'm looking at the greens and the reds and the blues.

Q. All right. Let me summarize it for the record, okay?

The coach-athletic director at feeder school one contacts three athletes at feeder school number two, different feeder pattern, picks those students up and takes them, transports them to a high school game at feeder school -- at high school number one in the number one feeder pattern, and when they get to the game the students are admitted free of charge where the admission is being charged, and they are not -- those students are feeders to high school number two, but they are admitted free of charge to high school number

one, game at high school number one. Do we have a Section 21 violation, yes or no?

A. I would have to -- you know, obviously you would have to just start writing down all of these things. When I start with it, the schools are the members, what we have got to determine is has the school violated the rules? That's what has occurred, violated the rules? All of those are factors going into it. If I'm looking at what you're stating up here, I would assume I guess that the high school is -- I'm assuming it's a member of the association.

Q. High school number one is a member of the association. **[2150]**

A. Then I would think you would start -- when you start right there, it's almost in reverse of yours. You have got admittance to the game and then you're going to start bringing in all the factors here of -- it's almost in reverse of yours. Not the way you started it, but we're going to start with what's happening up here with the member school and then work backwards and all of those are going to be factors, but as you look at what you said, yes, sir, I hear violation.

But if I can do that and make a disclosure that says, But I got to have, you know, some more stuff. In other words, with the way you have done it, would it seem to me, yes, sir, I would have a violation. But feeder school, as you were going through it, I mean I understand what you're doing, feeder school just -- I just blind them out because it has nothing to do with it.

Q. What other facts do you need?

A. I don't know that I think of it in what all facts I need. I'm just looking for all the information that I can get before I'm determining what's occurred. Now I'm going back and, you know, in the discussions with the principal, we're going to start through, okay, let's move through it. Let's look at all the issues, everything that's occurred. What's happened. What's the process that's been put in place at the school. How are they doing? So all of these **[2151]** things are going to be factors also.

* * *

Q. Well, even if you -- even if you think it's a violation just based on what we have said here in the courtroom today, you still have the discretion yourself to sit down again and make a different judgment, right?

A. No, sir. What I've got the discretion to do, as I see it, I'm looking at all the factors. Then I've got to make a determination of has there been a violation. Where I see **[2152]** the discretionary part coming in is when I have now got to set forth the penalties. That's now going to depend on what's the school done. Are they taking action? Because we don't see disciplinary action from the standpoint of us zapping people or zapping schools. Disciplinary action to us is a working together with the school, dealing with a violation of the rules. So it's - so, again, I'm going to have to make judgment calls, yes, sir, over whether this is a violation of Article II, Section 21.

I'm going to also have to make a determination of what that penalty is going to be.

Q. Right. And you do have discretion not just on the penalty, you have got discretion on whether there's a violation or not, don't you?

A. I don't think very much discretion. I'm going to have to make a judgment.

Q. All right, a judgment. A judgment involves discretion, an analysis of these facts, is not like taking a look at the 19 year old age rule, is it?

A. No, sir, not at all.

Q. This is very different than that, isn't it?

A. Yes, sir.

Q. In involves discretion, the age rule doesn't involve discretion, right?

MR. COLBERT: Objection. It's irrelevant.

[2190]

* * *

Q. Where is that in the rule? Where is that in the guidelines?

A. It's not in the guidelines.

Q. How are they supposed to know that?

A. I would start with what you have heard here, I would start with common sense.

Q. If our common sense differs from Mr. Carter's common sense, we might run afoul of the rule?

A. I would pick up the telephone.

Q. Pick up the telephone and call you?

A. Yes, sir.

Q. Say, Mr. Carter, can we go to the community center, can we set up a table, can we go door to door and talk to kids and search them out?

A. I don't think I would ever get that call, but if I had some concern about going to the community center or going to, you know, whatever, in the context that we put it in and all of those, if I had any concern in those areas, yes, I would pick up the phone. I would probably pick up the phone and call.

* * *

[2212]

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Q. Mr. Carter, are there schools in Tennessee that participate in interscholastic athletics that are not members of TSSAA?

A. Yes, sir.

Q. Can you name any of those schools?

A. By no stretch of my imagination could I name them all, but if I start in the corner, it would look like Washington **[2213]** College Academy, Kingsport Christian Schools, that I'm familiar with. School in the Knoxville area, I believe it's Grace Christian School.

In this area there would be schools, Holloway High

School, Webb School, Bell Buckle, Pioneer Christian, South Haven, Metropolitan Baptist. And I mean it's pretty -- it's obviously a pretty extensive list.

Q. Are there any other athletic associations in Tennessee that any of these schools are members of?

A. Yes, sir.

Q. What associations are you aware of that other schools, that schools in Tennessee are members of besides TSSAA?

A. I'm familiar that there are schools that are members of the Tennessee association, I'm not sure of the name, I think it's Tennessee Athletic Association of Christian Schools, their office or state office, whatever you want to refer to it, is in Chattanooga.

There is an association whose office is in Jackson, Mississippi, that is we referred to as Mississippi Private School Association, but it has schools in Louisiana, Alabama, Mississippi, Tennessee, I think Arkansas, so there are schools in Tennessee that are also members of the Mississippi Private School Association.

Q. All right. Are there any schools in Tennessee that you are aware of that at some point in time had membership **[2214]** contracts with TSSAA and elected not to renew those membership contracts?

A. Yes, sir. There would be quite a few.

Q. Can you name any of those?

A. In this area, Holloway High School, a former member, it's not a member now.

Q. Is Holloway public or private?

A. It a public school.

Q. Where is it?

A. It's in Rutherford County.

Q. And does Holloway High School participate in interscholastic athletics?

A. Yes, sir, they do.

Q. Why is Holloway no longer a member?

A. Well, Holloway High School, they were a member of

the association and they had had a number of violations, and there had been consequences of those violations obviously and then at some point, I don't remember the year, but just within the last couple of years the principal of the school just very simply felt at that time that their school could no longer comply with the rules of the association, so they very simply did not join the following year.

Q. All right.

A. They didn't -- I don't believe they withdrew. I think they just -- because we're on an annual basis, they just did **[2215]** not join the following year.

Q. Any other schools that you are aware of?

A. Webb School of Bell Buckle was a member for many years, then did not renew membership. And has not renewed membership.

St. Andrew's Sewanee was a member school, the association, then did not renew membership for a number of years and now has renewed membership again.

And another one in same category, Washington College Academy was a member -- one of our first independent school members, the thirties, and then did not renew membership at some point, then considered coming back but in meeting with the headmaster he just did not feel they could comply with the rules of the association and they did not join; have not joined at this time.

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[2216]

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Q. Mr. Carter, if Brentwood Academy chose not to sign a membership contract with TSSAA, would TSSAA have any authority to enforce its recruiting rule over Brentwood Academy?

A. No, sir.

Q. If Brentwood Academy chose not to sign a membership contract with TSSAA, would TSSAA's procedures for hearings apply to Brentwood Academy?

A. No, sir.

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[Testimony of Curtis Masters]

[2228]

* * *

Q. All right. Let me have those articles back.

Very specifically, is Brentwood Academy for a recruiting rule or are you just asking for an unlimited no recruiting rule whatsoever so that schools can just go out and in an unlimited fashion seek all the student athletes around the state?

A. On behalf of our board and our staff, our entire staff, I can say unequivocally that we are for a recruiting rule that prevents inappropriate conduct.

At the same time, I think what we want is a rule where we can predict what it means, where it's going to be assessed or measured to us the same way it's measured to other people, where we will be able to anticipate the meaning of the terms in it, so that we can comply appropriately, and especially we're legitimately making every effort to comply. That that will be --

Q. Are you interested in a rule that allows the school to tell its story?

A. Of course.

Q. Now what's the motto of the school? **[2229]**

A. The motto of the school is Vivat veritas: Let truth prevail.

Q. And has this issue -- have these issues regarding alleged recruiting violations, has it damaged the ability of

the school in its dealings with its own students and its own parents?

A. I think the ability of the school to communicate with people in general about the mission of the school is central to the success of our school and any private school. The current students and parents obviously are there because they believe in the stated mission of the school to pursue and challenge the whole person, body, mind and spirit, to the glory of God.

To call that into question is to call into question the decision that those parents are making every year, every day, to provide their kids and entrust them to us, and entrust them to our leadership, to develop their character and their relationship with each other, their academic and physical and spiritual gifts and talents and inclinations, so, yes, it's caused us some real complications there.

* * *

[2240]

* * *

Q. Now let's talk about enrollment letters for just a moment.

Do you know whether or not most of the students whose parents signed these enrollment agreements in the spring of the year go on to attend Brentwood Academy?

A. Yes, sir. The vast majority of them do.

Q. By vast majority, can you put any numbers to that?

A. I think out of the hundred fifty-four students that came the last year, perhaps five or six didn't come who had signed up to come.

Q. Are you familiar with the TSSAA recruiting rule?

[2241]

A. Yes, sir, I am.

Q. Is the rule -- how does the TSSAA recruiting rule affect the ability of Brentwood Academy to tell its story?

A. First, let me be clear that the school continues to want a recruiting rule. I want to be very clear for the record that we have never attempted to not have a recruiting rule. That's not what this case is about.

Brentwood Academy requires for its life blood, not only in terms of financial relationships to its families, but in terms of its culture and community, on people choosing the school, and they can't choose the school without hearing about the school.

And one of the complications that has come out of this situation is that in our effort to legitimately communicate the opportunities available at Brentwood Academy, we have come under attack -- pretty vigorous attack I think it's fair to say for situations where we had no intent to do anything wrong, where we were not connected with what had happened, in these several cases, and the result has been that we have withdrawn even further from communicating.

A couple of simple examples, people have come into my office to ask to pick up a packet of information, that's happened early on in my tenure, to pick up a packet of information to take to a family that they had been talking **[2242]** with who was interested.

And I said to Diane at the desk there, Mark's secretary, I said, Can I get a packet of information?

And her answer was, No, no.

She was alarmed that I was asking. She said, You can't give it to them.

I said, Why not?

She said, They have to come to the admission office.

I said, Well, let me take you down to the admission office, you can pick up a packet.

She said, No, no. You don't understand the other family has to come in and pick it up.

So we've stepped back from even conveying information to people who're requesting it to give to someone who's expressed an interest because we are so careful that we not cross some line out there. We're not sure where that line is.

But we're afraid that if we do certain things it could put us into a situation of being in violation.

I think it's particularly significant that in the time I have been here my son's been involved in a soccer league, a Y soccer league, he's now 14. During that entire time that I have been at his soccer practices and games I have never once invited a person to come check out Brentwood **[2243]** Academy. A lot of great families there, people that I think would be a great fit for the school. I'm the chief spokesperson for Brentwood Academy, the chief representative of the community, and I have not even invited people to come check out the school, who I thought would be a great fit, not because I would have been doing it for athletic purposes, but because in the context of being at a soccer practice, someone could point a finger at us or accuse us of a violation.

So I have been afraid to mention that. Even when they are looking for a place to have practices, I didn't offer Brentwood Academy, mindful of situations where people have been involved in the sports relationship and simply because of the sports relationship there is a conclusion that the relationship with Brentwood Academy was for athletic purposes.

And so for me even in my direct role I have been afraid to communicate what I think is legitimate opportunities that Brentwood Academy has there.

Q. Is the school able to make school initiated targeted communications, telephone calls and letters, to prospective students and their parents under the recruiting rule?

A. No.

Q. What does the admissions office do in order to tell its story? How does it do it? **[2244]**

A. We do offer, open houses. We have admissions days. Certainly as people come into our office we record the fact that they have come, we give them a packet of information, we invite them to apply when they have come to get that information, give them a tour of the building.

Q. Do you answer the telephone?

A. Obviously, yes, sir.

Q. Get a lot of telephone calls?

A. We get some, yes.

Q. All right. People inquiring? Then you respond to those calls, right?

A. Yes, sir.

Q. But you can't initiate the calls?

A. No, sir. Not to my understanding.

Q. All right. The initial contact guideline or rule as a part of Section 21, does that create problems for you, for Brentwood, in telling its story?

A. Well, particularly where we're trying to convey a message that reaches a broad audience, obviously we can do mass mailings and so on, but to particularly reach into areas of the community where we find -- where we are looking for people who would make an impact in the dimensions of our school, it's very difficult to articulate those opportunities without finding people that might fit the profile of our school and inviting them to take a look at **[2245]** our school.

Q. Where is Brentwood Academy located?

A. On Granny White Pike, in Brentwood.

Q. Brentwood, Tennessee?

A. Yes, sir.

Q. Okay. For the record, would you describe that community for us? Everybody in the courtroom knows about it, but appellate judges may not know about it. Tell us briefly what the composition of the Brentwood, Nashville, general market or Brentwood Academy is.

A. Brentwood is among the more affluent communities in the Nashville area, I would say. Certainly large houses. I think someone said that it was -- Williamson County was either the tenth or maybe in the fourth highest housing average housing costs in the country. Couldn't tell you where the statistic was from, but that's what I was told when I came here.

For a school like ours that grew out of humble

beginnings with a commitment on the part of its headmaster, Bill Brown, to nurture and challenge each child and to reach the kids that other people aren't reaching, and to make a difference in lives of young people, the school's commitment was to not just be for a particular segment of the community but to be available to lots of people.

And his commitment to divesity has been I think **[2246]** sustained and thorough and admirable, and I certainly am doing my best to carry that forward.

Q. What kind of diversity is Brentwood Academy interested in?

A. Obviously we're interested in several different kinds of diversity. It's a school that's committed to kids of average and above average ability, and so we have a wide range of academic abilities represented. Certainly interested in socioeconomic diversity. That's one of the most difficult challenges we face right now, to allow people to see the opportunities, regardless of their financial resources.

Racial diversity is important to us. Ethnic diversity. Cultural diversity. We're certainly seeing Nashville's profile changing with the influx of various minority groups and we're interested in our school representing that broad diversity. As the board's intent in their long range plan recently revised said to see Brentwood Academy reflect the diversity of the body of Christ. So in lots of different dimensions we are interested in having diversity, diverse communities.

Q. All right. Do you know of any state, federal or local laws that prohibit or prevent high schools from telling their stories just for academic purposes?

A. No, sir. **[2247]**

Q. Well, what has the problem been with the recruiting rule?

How does it specifically hinder you in the ability to tell your story?

A. The recruiting rule and its interpretation I would

say is the hindrance. In one sense you could say, What's wrong with the rule against undue influence for athletic purposes? But as I have seen it applied in this case, particularly, undue influence can be any influence. For athletic purposes can mean just that the student has been an athlete at some point or becomes an athlete at some point. It's very unclear how the meaning has been interpreted has been interpreted. It's unclear how it will be interpreted.

The inconsistencies that I have noticed, not only in this case, but in other experiences around as I have looked back, have made it clear that it's not easy to predict what that rule means. And so not only are we restricted in specifics that the rule states, but we're obviously operating under the concern about what it might be, how it could be interpreted. And that's been a real cause of concern for us.

Q. Does that -- what's the effect of that?

Your not knowing exactly how the rule is going to be interpreted, what is the consequence of that on you and **[2248]** on the school?

MR. COLBERT: Objection. Irrelevant.

THE COURT: It goes to the substantive due process.

Go ahead.

BY MR. BARFIELD:

Q. You may answer.

A. The effect of not knowing how the rule will be interpreted makes us limit our communication even when we think it might be legitimate. There are things that we think would be perfectly appropriate that we're not doing because it may be construed by some as inappropriate. We don't want to be vulnerable to the sorts of accusations that have been leveled against us in the past.

Q. Now did you or does the school have a need, a continuing need for increasing the diversity in your student body, like Ms. Brasher testified about several years ago?

A. Certainly.

Q. Now is this need for diversity, is this just a mask, a method to really hide behind a real underlying desire to get

the best athletes out to Brentwood Academy or is it a genuine school concern?

A. It's absolutely not a mask. Our school is committed to a diverse experience, not just because we believe it's good for others to have opportunity, but because our school needs **[2249]** those various parts of the community represented for the good of the kids that are coming to the school. It's impossible for them to understand the world as they will see it when they leave our school and to be prepared, interact with people that have different ideas and different backgrounds, different experiences and expectations, without having that in the school setting.

We want that to be a part of our school setting.

Q. Has your own personal experience given you reasons to push for a socioeconomic diversity at the school?

A. Well, certainly. Absolutely.

Q. How so?

A. Well, I've seen people very well off financially, I have lived on both sides of that spectrum I suppose. I have lived in a house with a grass roof and a bark floor, and I have lived in very primitive conditions where we had very little, very little income, where we depended on the financial generosity of others for the basics that we lived on.

I couldn't have gone to school and high school, for example, without people's generous financial support for our family. And at the same time I have been in settings overseas where I was the richest person there. Where people deferred to me, simply because of the status of our family. Not that we were wealthy by any American standards, but **[2250]** because we had metal, which the people had never seen before, because we had matches, because we had technology that was unheard of by those people. So I have seen both sides of the spectrum there and I recognize that it's important for my kids and the other kids in our school to understand that who you are as a person doesn't depend on what you have or where you grow up.

Q. Does this need for expanding diversity, did it exist

not just four or five years ago but did it exist every year that you -- is it a consistent need or is it just a one-time thing?

A. Absolutely. I think one of the big issues that we face as a school, and in our community, I think this is consistent for the broader private school community, racial diversity is not as difficult to attain perhaps as socioeconomic diversity. The families that are well off, regardless of race, hear about our school. They have other people that know about private schools, they check out private schools as a part of the normal process that families go through when their kids are growing up. But families from lower socioeconomic circles, people who don't move in environments where private school is a usual option, haven't heard of our school, whatever their racial background, and it's very difficult to find ways to let them know of the opportunities that are available at a place like **[2251]** Brentwood Academy.

Q. Do you have need based financial aid that's available every year?

A. Yes, sir, we do.

Q. What percentage of your budget is need based financial aid, roughly, or what is the approximate amount available?

A. The board has made a commitment to move that toward ten percent of the budget, but I think at this point it's six and-a-half percent or thereabouts. That's funded financial aid. That is, we're committed to raising the money to pay for the students that are there and that comes mainly through the annual funds and some small endowments as well as the parents association.

Q. How much money is that, roughly?

A. Something on the order of $400,000.

Q. All right. And you heard Ms. Brasher describe how the system for the distribution of need based financial aid, was that the correct way it's done?

A. Yes. In fact, we have, ever since I have been here,

put an application for financial aid in every admission packet, obviously that's expanded the numbers requesting at a special economic time like this, but rather than making it available only to those who ask, we felt like a part of this genuine effort to make people aware of the opportunity was to let them know from the start that financial assistance [2252] was available entirely on a need basis for people who qualified.

Q. All right. Do you know the racial composition of the four students that are at issue in this case, Kellogg, Curry, Davis and Eddy?

A. I believe I do, yes, sir.

Q. What are they?

A. Three of them were black and one, according to his father, is Indian. American Indian.

Q. What about the other nine students who received -- or eight students that received the spring practice letter but were not declared ineligible basically by the TSSAA? Do you know what race those students are?

A. They were all white.

* * *

[2273]

* * *

Q. Well, what this says on your website that's communicated to anybody who gets on it --

A. That's true.

Q. -- is when they look on the financial aid section of admissions, what they see is the student's character, leadership, academic, and/or athletic abilities and potential are carefully considered, right?

A. Yes, it does.

* * *

[2275]

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Q. You would also agree, would you not, that in sports competition, there has to be some system of maintaining the fair competition from one team to the next?

A. Yes. In some ranges, that's true.

Q. All right.

A. Again, the definition of fair becomes a key issue there, but certainly.

Q. And that's why we have got to have rules that everybody plays by, rules of the game, right?

A. Right.

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[2287]

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Q. Now you would agree with me, would you not, that Brentwood Academy is not under any compulsion to join TSSAA?

A. Compulsion in what sense?

Q. Well, there's no law requiring you to join TSSAA, is there?

A. No.

Q. You have heard Mr. Carter's testimony earlier that there [2288] were a number of schools in Tennessee that have athletics that aren't members of TSSAA and you know that's the case, don't you?

A. I do.

Q. So you would agree with me that the decision of whether to join TSSAA or not join TSSAA each year is Brentwood Academy's decision to make, right?

A. It is.

Q. And when Brentwood Academy makes that decision, it agrees that it will abide by the rules and the decisions of TSSAA, doesn't it?

A. Yes. Actually it says that it's our intent to abide by those provisions.

Q. All right.

A. Certainly.

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[2290]

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Q. Mr. Masters, I asked you if -- if Brentwood Academy just doesn't agree with the rules, it just thinks that the recruiting rule is just too much of a burden for it to bear, given its commitment to socioeconomics and racial diversity, Brentwood Academy can choose not to rejoin, right?

A. Absolutely, yes, we could.

Q. Or if Brentwood Academy believes that the hearing process that the schools have adopted and put into the by-laws is unfair, it could just choose not to rejoin, right?

A. It could.

Q. There are also mechanisms in the TSSAA organizational set-up to have rules changed, right?

A. Yes, there are.

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[2292]

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Q. Now would you agree with me that if the public schools who predominate in TSSAA enact a set of by-laws or rules to serve the public school mission, if Brentwood Academy's [2293] mission and those by-laws conflict, Brentwood Academy is free not to join those public schools in that association?

A. Yes.

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

[Caption Omitted in Printing]

TRANSCRIPT OF PROCEEDINGS – BENCH TRIAL

VOLUME IX of Ten

BEFORE THE HON. TODD J. CAMPBELL,
U. S. District Judge

on December 30, 2002

* * *

[Testimony of Curtis Masters]

[2386]

* * *

Q. All right. All right. Do you understand that Brentwood Middle School is a feeder school for Brentwood High School?

A. I would think so.

Q. All right. Now Brentwood Academy has grades six, seven and eight on campus, doesn't it?

A. It does.

Q. And that's a choice Brentwood Academy has made, right?

A. Right.

* * *

[2387]

* * *

Q. Okay. Now my question is is there anything that you [2388] understand the Brentwood High School coaches can do in the way of contact with the kids that are zoned to go to that school already that Brentwood Academy coaches can't do with kids who're in the middle school grades at Brentwood Academy?

A. No.

* * *

[Testimony of Bill Brown]

[2398]

* * *

DIRECT EXAMINATION

BY MR. COLBERT:

Q. You are Bill Brown and you were one of the founders and the original headmaster at Brentwood Academy, correct?

A. Yes, sir.

Q. And you were the headmaster from when to when, Mr. Brown?

A. Well, actually 1969, we started the school, and we opened the doors in '70 and then I retired in the year 2000.

Q. All right. So you were the headmaster back in '96, 1996 and 1997, at the time of these events that gave rise to this lawsuit?

A. Yes, sir. [2399]

Q. All right. Now Brentwood Academy as of 1996 and '97 and throughout your tenure as headmaster was a voluntary member of TSSAA, correct?

A. Yes, sir.

Q. Brentwood Academy joined TSSAA each year on an

annual basis, right?

A. Yes, sir.

Q. And paid a membership fee of a couple hundred dollars, correct?

A. Yes, sir.

Q. And Brentwood Academy was not under any compulsion to join, it did so voluntarily, correct?

A. Yes, sir.

Q. All right. And when Brentwood Academy joined TSSAA, it agreed to abide by the rules and decisions of TSSAA, each year, right?

A. Yes, sir.

* * *

[2400]

* * *

Q. Okay. Now one of the rules that you agreed in signing the card on November 14 of '96 and again on August 12th of '97, one of the rules that you agreed Brentwood Academy would conduct its program in accordance with was the recruiting rule, right?

A. Yes, sir. **[2401]**

Q. Okay. And you also agreed by this agreement to comply with the decisions of TSSAA, right?

A. Yes.

Q. And you knew at the time you signed these agreements that under the TSSAA constitution the Board of Control acted as the final appellate body within TSSAA, right?

A. Yes, sir.

* * *

[2409]

* * *

Q. Section 21, the recruiting rule.

Now if in 1997 Brentwood Academy couldn't live with this rule, if it was contrary to the school's mission, the school could have chosen not to join TSSAA that year, couldn't it?

A. Yes, sir.

Q. The decision about whether to have an interscholastic athletic program at all was Brentwood Academy's decision to make, right?

A. It was part of our philosophy of the athletic program, yes.

Q. Right. But there wasn't any law that you knew of that compelled Brentwood Academy to have competitive athletics?

A. No, sir.

Q. That was the school's choice as a part of furtherance of its own philosophy, right?

A. Yes, sir.

Q. And you know from being the headmaster of the school for some 30 years that neither the state Board of Education nor any other government agency has the power to require Brentwood Academy to play sports, or to join TSSAA, right?

A. That's right. But it is the only option that we had.

Q. Did you ever consider joining the Tennessee Athletic **[2410]** Association of Christian Schools?

A. No, sir. I don't feel like it would have been the place for our school really.

Q. Oh, okay. All right.

Did you ever consider playing independently like the Webb School in Bell Buckle?

A. Of course we considered it but, no, sir, it wasn't an option. You couldn't get a full schedule playing Webb every time.

Q. Well, I'm not suggesting you play Webb every time. You could play other schools, couldn't you?

A. If there were some others out there.

Q. If there were some others that would choose to play

you, right?

A. Well, if there were some other schools, yes, sir, that would play.

Q. All right. You know that the Webb School plays TSSAA schools, don't you?

A. In some sports, yes, sir.

* * *

[2440]

* * *

Q. Mr. Brown, you agree with me, do you not, that in interscholastic sports for there to be healthy competition between the schools, both sides have to have a fair chance to compete, you agree with that, don't you?

[2441]

A. Yes, sir.

Q. And I think your terminology actually was that there has to be a fair and even playing field between schools, right?

A. Yes, sir.

* * *

[2442]

* * *

Q. And you would agree, would you not, that for an organization like TSSAA that consists of a bunch of member schools that have joined together for athletic competition, keeping a fair level playing field is -- is a very important mission of that organization, you would agree with that, wouldn't you?

A. Yes, sir.

Q. Okay. If you don't have fair competition, you're not going to have competition at all before long?

A. That's correct.

Q. Would you agree with me, Mr. Brown, that when it comes to affecting the balance and the fairness, that athletic recruiting can affect the balance between schools in terms of -- in ways that other types of recruiting don't affect it? Let me see if I can help up out, okay?

Athletic recruiting, you would agree, would you not, serves the interest of the schools that recruit in ways that other types of recruiting don't because it helps them in competition against other schools?

A. If schools recruited athletically, yes.

Q. Yes. Yes.

A. I think that goes against the bent of every independent school in the state.

* * *

[2455]

* * *

Q. Okay. Now take a look, if you will, at Plaintiff's Exhibit 86, which I think I think you have, which is the July 29, 1997, letter from Mr. Carter. Do you have that?

A. Yes, sir.

Q. Okay. Now is it fair to say that based on the other exhibits that we have just finished looking at that there was a good deal of written exchange between you and Mr. Carter preceding this letter?

A. Yes, sir.

Q. All right. And there was also a meeting between you and Mr. Carter preceding this letter, wasn't there?

A. There was.

Q. Mr. Carter I think came out to Brentwood Academy and met with you and Coach Flatt there at the school, right?**[2456]**

A. Yes, sir.

Q. Okay. Now by the time you as the headmaster of Brentwood Academy got to the appeal hearing on August the 13th in Fayetteville and the subsequent

hearing on August the 23rd of '97, you knew what the charges were against Brentwood Academy, didn't you?

A. Yes, sir.

Q. Okay. And you knew because those charges had been clearly specified in Mr. Carter's correspondence from July 29th, right?

A. Well, yes, sir, the charges were, but I was struggling with the -- with the judgment.

* * *

[Testimony of Bernard Childress]

[2529]

* * *

Q. Mr. Childress, during your investigation weren't you also told by Jacques Curry that he was being recruited by David Lipscomb, Ezell Harding, BGA and Goodpasture?

A. He told me that he had received phone calls, yes, he did say that. He said, I received phone calls from people after ball games that said that they are from those particular schools.

And I asked him at that time, I said, Who're they, give me the names of some of these individuals.

And he had no names whatsoever. He said, I don't know who they were. They just identified themselves and said they were from those particular schools. He didn't have -- he didn't give me any names at all. He didn't even know for a fact that they were from those schools.

Q. But be specifically told you that he was being recruited by David Lipscomb, Ezell Harding, Battle Ground Academy and Goodpasture?

A. He told me he had received phone calls from people saying they were from these schools encouraging him to go to schools, yes.

* * *

[2530]

* * *

Q. Did you ever make any inquiries regarding to David Lipscomb? Did you ever go to David Lipscomb and say, Is anyone from your school recruiting Jacques Curry? Did you ever do that?

A. No, I did not.

* * *

[2531]

* * *

Q. You never went to BGA and went to them and asked has anyone made an allegation on behalf of your school is contacting Jacques Curry? Never went to BGA?

A. Did not.

Q. Have you ever gone to Goodpasture and said, We have received an allegation that your school is recruiting Jacques Curry, Jacques Curry's told us that, is that allegation true?

A. No.

Q. You never went to any of those schools?

A. Never went to those schools.

Q. Never followed up on any of those allegations?

A. Jacques Curry didn't give me any concrete information to go on.

Q. All right. Now he told you about this fellow Bart King, is that true?

A. That's correct.

Q. And did you consider the allegations about Bart King serious?

A. Did I consider -- wasn't for me to consider.

* * *

[2532]

* * *

Q. * * * Didn't you in your deposition say you thought they were were serious allegations against Bart King and Brentwood Academy?

A. Yeah.

Q. So the answer is yes then?

A. Uh-huh.

Q. All right. So you thought these were really serious allegations. And they all centered around or initially centered around this person Bart King, is that right?

A. That's correct.

Q. And at any point did you go and talk to Bart King and ask him, These 13 and 14 year old kids are making allegations about you?

A. No, I have no idea who Bart King is, no. I never - did not go talk to Bart King, and that's why you asked me about **[2533]** being I guess a private investigator. That's why I said I'm not an investigator because we deal with schools and when Mr. Carter tells us to go and talk to schools, and, you know, what he's asking us to do, and I guess our primary goal would have been and it is in any situation like this is that we go talk to administrators of the schools, we consider ourselves school people who deal with school issues, we want to do everything we can to work with the administration there at the school to prove those allegations wrong. We are not out trying to catch anyone doing anything. This is not a fun part of our job. I mean, no, we don't enjoy that. But when we -- you know, if Mr. Brown had said to us, Bart King did not do this, I know, you know, I know Bart King, I met him at the Rotary Club, I want you all to talk with Bart King, we would have taken our directive from the principal, the administrator of Brentwood Academy, we would have gone back, we would have been

glad to talk to him, but as far as trying to find Bart King's house, and go to him and talk to him in his home, that's not our job.

* * *

[2534]

* * *

Q. The burden's on the school you're investigating to tell you who you should go out and interview if you want the investigation to be complete and accurate?

A. We told Mr. Brown we will talk to anyone, we will talk to asyone you want us to talk to. And Mr. Carter instructed us, It doesn't matter how much time it takes, if he really felt, Hey, Mr. King is a person that I want you to talk to, then it happens all the time, principals tell us, Hey, you all come back on such and such a date, I'm going to have that individual here. And we are going to sit down and talk about this situation. We'll get to the bottom of it. That's what we would have been glad to do.

Q. So it's fair to say then the burden is on the school you're investigating to provide exculpatory information, otherwise you will go on whatever teensy bits and pieces you decided to get?

A. We go on information that's being true? Is that what you're saying?

Q. If I understand you correctly, what you're saying is you will go and interview whoever Mr. Carter tells you, you'll go and interview whoever Mr. Carter tells you, and if there are other people out there that will show that the school is innocent, even though they am obvious, or obvious people like Mr. King who came up over and over, you won't actually **[2535]** go out and interview them unless the school that's accused comes forward and says, Please, Mr. Childress, go talk to this obvious person and ask them if all those allegations are true?

A. I'm not going to talk to anyone unless Mr. Carter tells me.

Q. So it all centers around Mr. Carter, is that accurate?

A. I'm going -- I'm going to take my directives, if he tells me who you need to talk to, then that's who I will go talk to.

* * *

Q. Now Brentwood Academy -- TSSAA could punish Brentwood Academy for the actions of Mr. King even if King had no connection or affiliation with Brentwood Academy, correct?

A. About the rule? You asking me what the rule says?

Q. I'm asking you if the TSSAA could punish Brentwood Academy for the actions of Bart King even if he had no connection whatsoever to the school.

[2537]

* * *

Q. Let's take a look at your deposition at page 58, lines six through 25.

You said, Question, So even if -- even if Mr. King had no connection whatever to Brentwood Academy, if he wasn't a teacher there, wasn't a coach there, didn't have any connection there, huh, had no connection whatsoever, if Mr. King offered something of value to Jacques Curry in order to induce him to go to Brentwood Academy, do you think that would be a rule violation, a violation by Brentwood Academy?

You answered, Yes. I think it would be a rule violation.

Do you remember saying that? **[2538]**

A. I don't remember saying that.

Q. You agree I read your sworn deposition accurately?

A. Yes. I can read, yeah.

* * *

Q. All right. So you would agree it would be very important for you to know whether or not King were connected to Brentwood Academy or not?

A. Yeah.

Q. All right. And how did you determine that Brentwood Academy was connected to Mr. King?

A. I didn't determine it.

Q. You didn't determine it?

A. I didn't determine. Wasn't my job to determine whether Mr. King was connected to Brentwood Academy or not.

* * *

[2542]

* * *

Q. Now when you gave your deposition and you conducted this investigation, you believed that it was a violation for Brentwood Academy of the recruiting rule for kids who weren't zoned to Brentwood Academy to go to Brentwood Academy's spring practice, isn't that true?

A. I remember making that statement, but I also remember correcting it.

Q. In fact, you did correct it, didn't you?

A. Uh-huh.

Q. After you had a break in your deposition, you came back and told a completely different version of your interpretation of the recruiting rule, a hundred eighty degrees' opposite, isn't that true?

A. I made a mistake. Yeah.

Q. So before the break in your deposition you got up there in your deposition and you said it's a violation for Brentwood Academy if kids who aren't zoned to the school attends their spring practice?

A. That's correct.

Q. And then you had a break, and you came back and said later, or much later on in the deposition, right after the break, you said, Oh, no, that's not a violation. **[2543]**

A. Yes. I made a mistake in interpreting that particular rule. Yeah.

* * *

[2544]

* * *

Q. Okay. Now part of you job is to interpret the recruiting rule, correct?

A. Yes, sir.

* * *

[2546]

***

Q. Okay. Let me direct your attention back here in your deposition. You were specifically asked about coaches calling you and asking for interpretations of the rule.

Do you remember that in the deposition?

A. I don't remember that. That was 1997. I don't remember **[2547]** that.

Q. Let's look at it. If you go to the page earlier, at the bottom of the page, please.

So if I'm a principal at school and I have a recruiting question under Section 21, can I call the TSSAA? Can I ask you, Hey, Mr. Childress, can you answer my question?

Answer: Sure.

A. Uh-huh.

Q. So part of your job and all of the other assistant directors and Mr. Carter was to receive calls and answer

questions about the interpretation of the recruiting rule, isn't that true, Mr. Childress?

A. Again, you're pointing out things that I said, sure, you call and ask that, but then I also on over in there I said if you want an official response, we are going to ask you to put it in writing to us and we are going to give you an official response in writing.

***

[2548]

* * *

Q. Now, Mr. Childress, before the break you suggested that Mr. King was somehow connected to Brentwood Academy. But in 1998 you didn't believe he was connected to Brentwood Academy in any way, did you?

A. In 1998, I didn't know whether Mr. King was connected or not connected to Brentwood Academy.

Q. Because you hadn't completed a thorough and accurate **[2549]** investigation, right?

A. I had done exactly what I was asked to do.

Q. Isn't it true, Mr. Childress, that in 1998, when you gave your deposition, you said that you didn't believe that Bart King was connected to Brentwood Academy in any way?

A. I don't remember.

Q. All right. Let's take a look at your deposition at page 194, starting at line 17.

Now who are the persons connected with Brentwood Academy?

Your answer, At that time I believe they said John Patton had helped. Well, was coaching middle school.

Question: Okay. Brentwood Academy. Okay.

Then your answer, Not connected with, at this point I believe they had already said that Mr. King was not connected with the school in any way.

Question: That's right. Mr. King. What about Kevin Armstrong, was he one of the persons not connected?

Answer: Not connected.

Now do you remember at that time saying that you believed that Mr. King was not connected to Brentwood Academy in any way?

A. I think it said -- what it said was -- said that Mr. King was not connected to them in any way. That's what -- if I said that, that's what Brentwood Academy had said that [2550] Mr. King was not connected to them.

Q. But you were being asked whether Mr. King was connected or unconnected, weren't you?

A. And that's why the school had said he was not connected.

Q. Oh. So you were playing a little word game there with them?

A. I wasn't playing a word game. That's what the school said.

Q. Did you believe the school?

A. I didn't have any reason to doubt them.

Q. Okay. All right. Now at the time you were conducting this whole investigation, you and Mr. Menees and Mr. Carter all believed that King, Armstrong and Patton were Brentwood Academy recruiters, didn't you? That was the pre-supposition that you were operating under?

A. Oh, what I had -- I was -- those kids told me that Mr. King was the recruiter for Brentwood Academy. Now you have to ask Mr. Carter and Mr. Menees what they sought. I don't know what they thought.

***

[2558]

* * *

Q. All right. Now speaking of singling out in this case,

the free tickets, if those kids who got the free tickets, those two kids who were singled out, if they had been in Brentwood Academy's feeder pattern, it wouldn't have been a recruiting rule violation, would it?

A. If they had been singled out and given tickets.

Q. Exact same case except they were in Brentwood Academy?

A. If they were singled out it would have been.

Q. Well, that's not what you said in your deposition.

A. Well, I was wrong.

Q. Let's look at your deposition. Page 180, lines 14 through 25.

You were asked, If there had been a feeder pattern and the students from Neely's Bend had been admitted at Hunters Lane High School free, that would not have been a violation of the recruiting rule?

Your answer, That's correct.

* * *

[2560]

* * *

Q. Let's look at page 125 of your deposition, starting at line nine and going to line 24. Do you remember being asked these questions?

Question: Okay. Can they send the printed material on their school?

You're being asked whether they can send out information to their school.

Your answer: Non-feeder?

Question: Non-feeder.

You said, No.

Okay. No printed materials?

Your answer, No.

Without a definite feeder pattern?

Right.

In a feeder pattern they can send the printed material, right?

You say, They can contact, yes.

Question: And they can contact them, right, in a feeder pattern?

Answer: If they have a definite feeder pattern?

Question: Right.

They can contact them, the school can contact the **[2561]** new kids, prospective students, right?

And your answer, Yes.

Was that accurate?

A. That's accurate as the way I answered the question then?

Q. Right.

A. Yes.

Q. So in 1998 it was your view that a school could send printed communications to a student as long as there was a feeder pattern, but if there wasn't a feeder pattern it was prohibited under the recruiting rule?

A. Well, --

Q. Is that a yes or no, then you can explain. Is that your view in 1998?

A. If what' what I said, yes.

* * *

[2562]

* * *

Q. Mr. Childress, in 1998 you were the assistant executive director of the TSSAA, right?

A. I was.

Q. And you're one of the five top executives of the **[2563]** organization? Yes or no?

A. Yes.

Q. One of your jobs was to interpret the recruiting rule?

A. That would be correct.

Q. Even you, even you at that time, before walking in here to federal court, but at that time you believed that there was a feeder pattern exception, and that there were some things that a feeder school could do which a non-feeder school could never do under the recruiting rule, isn't that true?

A. I believe there were things that usually occur in a -- where there were feeder patterns.

Q. But that's not what you said in '98, was it?

A. You got it up there, you see what I said.

Q. I'm asking you. That's not what you said in 1998, is it?

A. Apparently not.

Q. Your story's totally changed?

A. According to the way I understand the rule. I'm just giving you the way I understand the rule today.

Q. In this lawsuit?

A. I'm giving you the way I understand regardless of the lawsuit or anything, I'm giving you the way I understand the rule today.

* * *

[2568]

* * *

Q. * * * Now can you tell me where in this guideline, where in this guideline does it say that a principal can allow kids outside of its feeder pattern into his school for free?

A. It doesn't say it.

Q. As long as the other principal agrees?

A. You can read it like I can. It doesn't say it.

Q. It doesn't say it, does it?

A. Unh-unh.

Q. In fact, guideline number seven expressly forbids what you just now said would be okay, doesn't it?

A. No. Not the way that's -- not as my interpretation. Because what we have said in staff meetings that I have been involved in is that the principals are in charge of the schools, and we are going to always look at the entire situation, and the key is has undue influence, is undue influence being used to secure those kids to go to this school. And if the principals agree, then the principals are the ones that are going to be in charge and, you know, this would be something you would have to ask Mr. Carter. I said both principals agree, according to the way we have been interpreting the rule in the staff meetings, is if both principals agree, then he is going to probably talk to them and let them be aware, hey, look, you all run your schools, **[2569]** this is what you have decided to do, you may be just aware and talk about perception of what other member schools are going to say, but if both principals agree, I don't see him making that -- punishing a school, to make that a violation.

Q. So, in other words, Mr. Carter or whoever is enforcing the rule can totally ignore example number seven as long as the principals agree?

A. Principals are in charge of the school.

Q. So Mr. Carter can totally ignore the guideline number seven, if he feels like it?

A. He's not -- I don't know if he is totally ignoring it. He's giving the principals -- the principals is in charge of the schools.

* * *

[2571]

* * *

Q. What if you're not invited to those meetings? What if you're a principal at Brentwood Academy who doesn't come to staff meetings, how would you ever know that that's the way Mr. Carter decided that he is going to apply the

rule?

A. If you have that in your mind to do, best thing to do is put it in writing to him and ask him. Or pick up the phone and call him.

Q. In advance of what you do?

A. In advance.

Q. And --

A. That's what most people do.

Q. If not, because if they don't, they could run afoul of Mr. Carter, couldn't they?

A. Run afoul of Mr. Carter?

Q. Or the rule. They could end up violating the rule?

A. They could. They could.

* * *

[2575]

* * *

Q. Now this giving of the free tickets, would you agree that's a completely normal and appropriate thing to do for a coach to give tickets to another coach?

A. Yes.

Q. Nothing abnormal about that at all? Totally fine?

A. Yes.

Q. All right. Now, in fact, when you were conducting this investigation and trying to determine under the recruiting rule what was normal and appropriate, you knew absolutely nothing about what the normal ticket policies were across the state, did you?

A. No.

* * *

[2580]

***

Q. I'm asking, Mr. Childress, I'm asking you whether or not you made any attempt to find out whether any of the kids who got these letters if they were harmed by it, that's all I'm asking.

A. No, no.

Q. You didn't?

A. I didn't. I said I didn't.

***

[2591]

* * *

Q. Did you supply any of the information to your investigation, any of your written materials to Brentwood Academy?

A. No. To anyone from Brentwood Academy?

Q. Did you ever give any of the notes to Brentwood Academy?

A. Any of my notes? No.

* * *

Q. Do you remember Mr. Nebel getting up and over and over asking, please, just tell us who said these things, what we're accused of, what this is all based on? You remember him getting up there and literally pleading for some sort of information to look at and what, you remember that?

A. I remember Mr. Nebel saying, and I also remember people in the crowd screaming and hollering, just tell us what we did, just tell us what we did, and I can remember Mr. Carter's response, he turned the meeting over to

Mr. Brown and he does like he had done in previous hearings, and said, This is a meeting of school people, about a school issue, this is not a court of law. And he says, Mr. Brown, give you an opportunity to present anything that you have to **[2592]** present at this time. And he turned the meeting over to Mr. Brown, and I do remember Mr. Nebel saying that he wanted to, I guess, cross-examine or he wanted to talk with Mr. Menees and I during that particular time, and Mr. Carter then said, Well, Mr. Nebel, I want to remind you this is not a court of law, we're school people, dealing with a school issue, it's not a court of law, we're not here to cross-examine people.

Q. So Mr. Carter then absolutely refused to let you answer any questions posed by Brentwood Academy?

A. That was not our purpose for being there. Our purpose for being there, the way I said, was to give Mr. Brown an opportunity to tell their side of the story.

Q. Why didn't you give Brentwood Academy your notes? You knew that they needed them.

A. They didn't ask for them.

Q. You just testified they were begging for information.

A. They didn't ask for my notes.

Q. Mr. Childress, you knew that they were wondering what in the world this is based on. Did you ever think this is terribly unfair?

A. No.

Q. You didn't think it was?

A. I never thought to give them my notes. No.

* * *

[2593]

* * *

Q. You weren't allowed to answer Brentwood Academy's questions but you did answer all the questions in

the secret deliberations both in Nashville and Fayetteville, didn't you?

A. If any of those board members had a question when we went into deliberations, they asked me questions about what I had done or who I talked to, yes, I answered those questions.

* * *

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

[Caption Omitted in Printing]

TRANSCRIPT OF PROCEEDINGS - BENCH TRIAL

VOLUME X of Ten

BEFORE THE HON. TODD J. CAMPBELL,
U. S. District Judge

on December 31, 2002

* * *

[Testimony of Gene Menees]

[2629]

* * *

Q. All right. Does TSSAA have any policies relating to how investigations are supposed to be conducted?

A. No, sir.

Q. Okay. Does TSSAA have any policies about conflicts of interest or possible conflicts of interest in the way investigations are conducted?

A. No. sir.

* * *

[2642]

* * *

Q. Well, whether or not the phone call or the letters

were problematic would depend on whether it influenced Jesse to go to the school, wouldn't it?

A. I don't know about the letter or phone call that would have influenced Jesse to go to the school there. Only thing we were dealing with was Coach Flatt had sent a letter, followed up with a phone call, and that's what we were dealing with.

Q. Well, the letter and the phone call don't mean a hill of beans, do they, if they don't influence the kid to go to the school, right?

A. That's incorrect. It could still be undue influence because it could still be undue influence.

Q. Why?

A. In regard to the enrollment policy that we work under, that they were not enrolled at Brentwood Academy at that time, they were still enrolled at Neely's Bend Middle School so you could, you know, you could determine at that point, with me not seeing the letter, which I had not seen the letter at that point, but could be interpreted as some type of influence on getting young men or women to a school for **[2643]** athletic purposes.

The answer is yes to that question.

Q. Well, I'm confused. Does the letter and the phone call, do they have to actually result in influence or is it just an attempt at influence?

A. I guess it could be both.

* * *

Q. All right. Well, regardless, you didn't ask Jesse Kellogg whether the letter or the phone call had any influence on him whatsoever?

A. No, sir.

Q. Okay. In terms of trying to decide about whether the letter was undue influence, you had to look at the letter, didn't you?

A. Yes.

Q. You had to see what the content of the letter was,

didn't you?

A. Yes. **[2644]**

Q. And in terms of determining whether or not the letter was undue influence, the content was what mattered, wasn't it?

A. Yes.

* * *

Q. All right. Well, under the recruiting rule as you understand it, if a person is trying to encourage a child to go to a school for academic and athletic reasons, is that a **[2645]** prohibition under the rule?

A. What person?

Q. Any person.

A. Yes, it can be. Let's go back and use -- I'll just myself as an example of Davidson Academy. If I was encouraging baseball players to attend Davidson Academy, that would be against our recruiting rule.

Q. Well, wouldn't it matter why you're encouraging them to go there?

A. If it was to play baseball. Now if I use baseball -- if I use the academics to get to them with the baseball example, then it would still be defined as undue influence.

* * *

[2647]

* * *

Q. All right. You said you made notes or notes of your discussion with Kevin Armstrong and Jesse Kellogg?

A. Correct.

Q. And you gave those to Mr. Carter?

A. Correct.

Q. All right. Did you ever give a copy of those notes to Brentwood Academy?

A. Did I personally? No, I did not.

Q. Well, do you know if TSSAA ever gave a copy of your investigation notes to Brentwood Academy before the August 23rd appeal hearing?

A. I cannot answer. I don't know.

Q. You don't know?

A. No, sir.

Q. Y'all have a policy about whether or not investigation notes are provided to a school that's been accused of recruiting rule violations?

A. No, sir.

* * *

[2648]

* * *

Q. You don't tell them we have notes that are available for your review?

A. No, sir.

Q. All right. So a school may not know if you made notes, right?

A. That would be correct.

* * *

[2649]

* * *

A. Well, only thing we dealt was was the fact there was potential athletes that had an interest in Brentwood Academy that used a ticket to come into a game free, that's what we dealt with.

Q. But didn't the background ground circumstances matter about how the tickets had found its way into the kids' hands?

A. We did not deal with the intent or the background, we dealt with the action.

* * *

[2652]

* * *

Q. All right. Well, did you ever talk to Bart King?
A. No, sir.

* * *

[2653]

* * *

A. Well, basically what we did was we went to Brentwood Academy, I mean we went there initially, and then the letter with the questions came, and Bart King was mentioned. Obviously as a concern that we had turned in to us in regards to the middle school athletes. Then we're school people dealing with school people. I mean, we handed at that time -- we gave Brentwood Academy an opportunity to respond to the concerns that we had and Mr. King was one of the concerns. So we did not talk to Mr. King.

Q. I'm not sure that was an answer to my question.

My question was why didn't you talk to Mr. King?

A. I don't know the answer. We decided not to talk to Mr. King. I don't know specifically why we decided not to talk to him.

Q. Okay. You would agree with me, wouldn't you, that given that he was identified as this person who is possibly giving sneakers and jewelry and talking about cars and things like that to these kids that might have been a good thing to talk to him, wouldn't it?

* * *

[2655]

* * *

Q. You don't know whether y'all ever told him that's what Bart King had been alleged to be doing?

A. I don't remember that.

Q. All right. So you don't know whether they knew Bart King was doing that kind of stuff or not?

A. I do not know personally, no.

* * *

[2656]

* * *

Q. All right. You said just a minute ago that your only concern ultimately was that one of these tickets found its way into Jesse Kellogg's hand, right?

A. In regard to the tickets, yes.

Q. It didn't matter in the end, all the circumstances underlying that didn't really matter, did it?

A. Correct.

Q. Okay. So the totality of the circumstances really was not the focus, right?

It was just the fact the ticket made it into the kid's hand?

A. Correct.

* * *

[2659]

* * *

Q. Did you during the open part of those two appeal

hearings, the one on the 13th of August, '97, and the one on the 23rd of '97, did you ever present your investigative findings in sort of an open session or in front of Brentwood Academy?

A. No, sir.

Q. You did not?

A. No.

Q. Now I think you told me earlier they didn't have a copy of your investigative notes at that time?

A. They didn't have a copy that I'm aware of.

* * *

[2661]

* * *

Q. Okay. Now Mr. Childress indicated yesterday that so long as two principals agreed at two different schools that some things that might be undue influence under the recruiting rule won't be considered undue influence, is that right?

A. Well, no, that's not necessarily right. I don't know what Bernard said.

Q. Let me give you the example he gave yesterday.

A. Okay.

Q. The example he gave yesterday was if Mr. Masters, the headmaster at Brentwood Academy, calls up the principal at Brentwood Middle School and says, We're going to let in all of your football players for free at our next home game, and as long as those two principals agree that that's okay.

A. As long as two principals agree, that's correct.

Q. All right. And that's okay under the recruiting rule?

A. Well, it's okay as long as bringing them in free. I mean if both principals agree, the answer is okay.

Q. Well, where does it say in the recruiting rule that

because -- let me back up just a second. **[2662]**

Because if they don't agree that would be a problem, wouldn't it?

A. That's correct.

Q. Because --

A. Are you talking about Brentwood Middle and Brentwood Academy?

Q. Yes, sir.

A. Yes, sir.

Q. Because Brentwood Academy -- excuse me, Brentwood Middle is not a feeder school for Brentwood Academy, right?

A. Correct.

Q. All right. But as long as the two principals agree, we don't worry about the fact there is not a feeder pattern?

A. Correct.

Q. Okay. Does it say anything in the recruiting rule about that or in the interpretative commentary that as long as two principals agree we're not going to worry about all that feeder pattern stuff?

A. Are you talking about in the recruiting rule?

Q. Yes, sir.

A. No, sir.

* * *

[2663]

* * *

Q. But you have more liberties within a feeder program than you do outside of one, right?

A. That you have sonic more liberties, that's correct.

Q. There are things you can do within a feeder pattern **[2664]** situation that you can't do outside of one, right?

A. That's correct.

* * *

[2665]

* * *

Q. * * * Talking again just a second about the appeals hearings, the members of the Board of Control at both of these hearings got copies of your investigative notes, didn't they?

A. I don't remember. I really don't.

Q. Well, if some of those folks have testified in this case that they have --

A. Yes, then they did.

Q. You have no reason to doubt them, do you?

A. None at all.

Q. Okay. And if they said they had based their decision in part or in whole on your investigation findings, you wouldn't have a reason to doubt that, would you?

A. No, sir.

[Testimony of Ronald Lee Carter]

[2809]

* * *

Q. All right. Mr. Carter, is intent -- can you have a violation of the recruiting rule without an intent to violate the rule?

A. Yes, sir.

Q. How is that?

A. Well, first of all, I think you start with the fact that the vast majority of our people don't intend to violate rules. Just about all of your violations are unintentional. I probably could count on one hand the number of intentional acts that we have had over the course of time. So intent has absolutely nothing to do with violations. You can't -- number one, you can't read it. You can't start trying to figure out did they intend to do it, all of these kind of things.

We just deal with has the rule been violated. Intent only is going to play in is if we have an intentional act. The penalty is obviously going to be more severe. An example of an intentional act would be a coach playing a student, ineligible student under an **[2810]** assumed name. It's hard to look at that one and think that's unintentional. So intent is never going to be part of the consideration whether it's a violation, it will only rise to the level if in fact it occurred. It will stick out.

So the rest of the time, the rest of them, 99 percent of them we're not looking at intent.

* * *

[2832]

* * *

Q. Okay. Now when in 1992 and '93 did the state Board of Education send a communication over to the TSSAA and tell you, Here are a list of the state interests that we think **[2833]** are important in the recruiting rule and we want you to put them in your rule?

A. No, sir.

Q. Did the Commissioner of Education do that?

A. No, sir.

Q. Did anybody at the state of Tennessee do that?

A. State of Tennessee meaning?

Q. Meaning somebody on or about TSSAA. Somebody over at the big house. The governor's office, the Attorney General. Anybody over there?

A. No, sir.

Q. In 1984, let's just assume for a minute that's when the rest of these changes were made, in 1984, did anybody from the state of Tennessee Board of Education come to you all and say, Hey, here are the problems that we have got with the recruiting rule, here are the state interests, we want you to put in a rule that will enforce them? Did they

do that in '84?

A. No, sir.

Q. Commissioner of Education didn't do it either, did they?

A. No.

Q. The attorney general didn't do it either?

A. No, sir.

Q. The governor didn't do it?

A. No, sir. **[2834]**

Q. Nobody from the state did it, right?

A. No, sir.

Q. And you didn't have a study done either in 1984, did you?

A. No, sir.

Q. You didn't do it in 1994 either -- 1992, did you?

A. No, sir.

Q. You didn't go out and say, Look, we got a problem with high school athletic recruiting in Tennessee, we need to find out what the problem is and we need to fix it, let's do a study, let's find some surveys, let's get some information, let's get some data? You didn't do any of that, did you?

A. No, sir.

Q. Mr. Colbert gave you some books up here, didn't he?

A. Yes, sir.

Q. Those books are sitting up here. Now one of those books is Bragging Rights, right?

A. Yes, sir.

Q. Now Bragging Rights was written, copyrighted in the year 2000, wasn't it?

A. Yes, sir.

Q. Okay. So nobody in 1984 or -- in 1984 or 1992 considered that in connection with any changes in the recruiting rule, did they? **[2835]**

A. No, sir.

Q. Okay. Same thing is true with Game of Life, which was written in 2001, right?

A. I didn't look at the copyright on it, but, I mean --

Q. You want to look at it?

A. If you want me to.

Q. All right, I do.

The Game of Life, what's the copyright?

A. 2001.

Q. All right. So it's fair to say that no one in 1984 considered changes to the recruiting rule -- or 1992 considered that book, right? Hadn't been written?

A. Yes, sir.

Q. All right. Now let's try Beer and Circus. That's a 2000 book, by Sperber. Am I right about that?

A. 2000.

Q. 2000. Okay.

So pretty obvious that that book wasn't considered by anyone at the TSSAA in '84 or in '92 in considering changes to the recruiting rule, right?

A. That's correct.

Q. College Athletes For Hire, that's a 1998 book I believe. Check the copyright on that, if you would, Mr. Carter.

A. What's the name of the book? **[2836]**

Q. College Athletes For Hire.

A. I haven't seen that book. I'm not familiar with that one.

* * *

Q. Let's go to Friday Night Lights in 1990, by Bizzinger. That book was written in 1990, right?

A. Copyright's 1990.

Q. All right. So it dearly wasn't considered in 1984, was it? Obviously not?

A. No, sir.

Q. Okay. Now my question to you on 1992 and '93, do you of your own personal knowledge know whether the gentleman or ladies or whoever served on the committee with the recruiting rule whether they read and relied upon that book in making suggested changes in '92 and '93 to the

guidelines for the TSSAA rule?

A. I don't remember whether -- obviously wouldn't know whether they read it or not, but I don't remember it being a part of a discussion. [2837]

Q. Okay. One more is Raw Recruits. I think that again is copyrighted in 1990, right?

A. Yes, sir, that's correct.

Q. Okay. So you would agree with me, would you not, that the 1984 group that looked at changes to the recruiting rule didn't look at that book because it wasn't published, right?

A. No, sir.

Q. Do you, of you own personal knowledge, Mr. Carter, know whether or not the members of the committee that looked at changes to the recruiting rule in 1992 and 1993, whether they looked and considered the book Raw Recruits or not?

A. No, sir, I wouldn't know whether they read it or not.

Q. All right. Thank you.

I ask the witness to be handed Exhibit 83, if you would. It's the Harpeth School letter. I ask you to pull up paragraph two.

Do you have it?

A. Yes, sir.

Q. Okay. Now I want to call your attention, if I may, Mr. Carter, this is a letter you wrote to Mr. Brown of April the 29th, 1992. Look in the second paragraph, second sentence.

A. Yes, sir.

Q. And you wrote in 1992, As I'm sure you're aware, TSSAA rules state that these type calls will not be made at the seventh grade level or above. [2838]

Did I read that correctly?

A. Yes, sir.

Q. Okay. The TSSAA rules that you are referring to there included both Section 21 and the interpretative commentary, did it not?

A. Probably not good wording on my part in terms of what's there because the reference is obviously to the question that's not part of the rules, but, you know, reference is very simply state to the point that -- again the discussion is where undue influence is and what has taken place does not apply below the seventh grade level.

Q. But the reason, Mr. Carter, it's an unfortunate choice of words is because you have come in here and you have told one story earlier and you're telling another story today, isn't that true?

A. No, sir.

Q. Yes, sir. What about this? Now you have come in here early on in this lawsuit, you and your client and your lawyers took the position that these were rules, per se rules, that's interpretative commentary, per se rules that restricted your discretion to apply Section 21, right?

A. No. I think the reference you're talking about is that some of them -- as you look at them some of them by their very nature are going to be much -- much more of applying the rule. The example is the ineligibility of students. **[2839]** But when you get to the one that you talk so much about, question number four, it's talking about guides.

Q. But you were talking in 1991 about the TSSAA rules, you weren't making distinctions between the rule and the interpretative commentary, are you? Were you?

A. Yes, sir. I mean the rule is Article II, Section 21, that's our by-laws. The questions and answers don't matter what part of it is, is not the rule.

Q. I know it, but you didn't say the TSSAA questions and answers state that these type calls, you said that the TSSAA rules, and the reference to seventh grade does not appear in Section 21, does it?

A. No, sir.

Q. In fact, Mr. Carter, when you have come in here throughout the trial of this case, you have taken the position that it is all Section 21 and nothing is binding on you,

everything's discretionary, in the interpretative commentary, did I get that correct?

A. Can you just repeat the question? I mean –

Q. Yes. Isn't that the position you have taken in the trial in this case?

A. Would you repeat the question that you had at the beginning?

Q. Yes. Haven't you all come in here and testified three days for six hours and told us that Section 21 of the **[2840]** recruiting rule is all that really counts, everything else underneath it, the interpretative commentary is discretionary and it depends upon the totality of the circumstances?

A. Sure.

Q. I mean that's what you said?

A. I'm going to have to apply Article II, Section 21, certain parts of what comes under there are obviously going to be much more of a discretionary in the term you're using than other parts of it are going to be by the very nature of questions.

Q. But that position is something you didn't take back in 1992 when you were writing this letter, did you, because you were talking about the TSSAA recruiting rule?

A. I had taken the same position then.

Q. Going back just a minute to this committee in 1992-1993 that was considering –

A. Put this aside?

Q. Yes. -- considering changes to the recruiting rule, are you aware of that committee considering any documents or evidence that has been introduced into the evidence in this case in their decisions of their deliberations about the recruiting rule in '92-'93?

A. I'm not aware of any. I mean –

Q. The same thing's true in 1984, isn't it? You are not **[2841]** aware of any evidence, any documents that whoever considered the additions and whenever they considered them, questions one, two, three and four, you're not aware

of any evidence that they considered in looking at what changes to be made, what additions to be made to the guidelines, right?

A. No, sir.

Q. All right. Now I asked you about research just a minute ago but I want to ask a specific question about harms, okay, for just a minute?

Are you aware of any empirical research about the harms to students or their parents of athletic recruiting at the high school level?

A. Empirical research?

Q. Yes, sir.

A. No, sir. I'm not aware of any.

Q. Let me talk with you about the transfer rule for just a brief second. I understand the court's impatient with this, with this angle, but I want to ask a couple questions about it. It was brought up by Mr. Colbert.

In applying the transfer rule in Tennessee, over the last 20 years, is there an exemption for a transfer when the transfer is for bona fide academic purposes?

A. No, sir.

For bona fide --

Q. Academic purposes. **[2842]**

A. I never thought -- bona fide always is reference with bona fide change of residence, that's why it threw me for a minute.

There's not a change for what? What are academic purposes?

Q. Yes. Yes.

A. No, sir.

Q. So if you had a situation in which there was a transfer for academic reasons, but it was against the transfer rule because there were athletics involved, which would trump, academics or athletics?

A. Again, the transfer rule doesn't look at what motivates. The transfer rule doesn't deal with whether it's athletic reasons or not. The transfer rule just is applied

straight.

Q. Yes.

A. Now then what could occur is a school could apply for a hardship ruling in regard to any of our rules, so --

Q. Okay.

A.-- you could have a student that would be ineligible by the transfer rule, and then turn around and apply and be taken on a case by case basis.

Q. But it's true that the athletic -- the transfer rule applies in such a way that if a student transfers from school A to school B with an athletic record and they have **[2843]** to sit out a year so they can't play for a year, generally?

A. Well, no, sir. That's not --

Q. That's one of the restrictions on it?

A. No, sir, that's not really very accurate of the transfer rule.

Q. All right. The question that I really want to get at, I don't want to go into a discussion about the transfer rule, but I do want to get at this.

A. Right.

Q. The transfer rule does not, does not exalt academics over athletics, does it? It's the reverse? The transfer rule exalts athletics over academics, doesn't it?

A. No, sir, doesn't really exalt anything over anything. It simply says the student transfers to a school and has an athletic record in that sport or sports, depending upon how it does, then it's going to be -- he or she is going to be ineligible in those sports 12 months from their last participation date. So it's just a straight statement. It doesn't deal with what motivated the transfer or where the transfer's taken place or anything.

Q. All right. So if the student is transferring to a better academic school, or for better academic purposes, the transfer still wouldn't be allowed?

A. If the student had an athletic record, the student is going to be ineligible in the sports involved. Again, very **[2844]** rare that a student's ineligible in all sports for 12

months.

Q. All right. Let me go back to this committee in '92 and the committee, or whatever it was, in 1984, that considered changes and adopted changes to the recruiting rule.

Do you know whether or not either of those committees considered the non-speech speech alternatives for non-speech related alternatives for accomplishing whatever the recruiting rule purposes were deemed to be?

A. I don't remember that discussion.

Q. At either time?

A. No, sir.

* * *

[2855]

* * *

Q. All right. Now I have referred to a couple times the committees in '84 and '92. Now obviously the Legislative Council is the body that would initially consider changes to the constitution or by-laws of the TSSAA, right?

A. That's correct.

Q. Now do you know whether or not the Legislative Council at any time in the last ten years ever considered alternatives to restricting speech in looking at the recruiting rule?

[2856]

A. No, sir.

* * *

BY MR. BARFIELD:

Q. In fact, it is true, isn't it, that the Legislative Council has given no consideration whatsoever to how can we tailor

the recruiting rule to meet the requirements of the First Amendment, isn't that true?

MR. COLBERT: Same objection.

THE COURT: That goes to all issues.

THE WITNESS: There hadn't been any looking at changing it for any of the reasons that you have stated there.

BY MR. BARFIELD:

Q. Say again?

A. Well, your statement was that has there been any look at changes, we haven't changed the recruiting rule in -- well, I don't remember the last time. I think your reference is '92.

Q. '92.

A. So they have not looked at anything else.

Q. Okay. So it is true, isn't it, that the Legislative **[2857]** Council, the appropriate body of the TSSAA, has not considered any alternatives to restricting speech with respect to the Section 21, is that right?

A. That's correct.

Q. All right.

MR. COLBERT: Same objection.

THE COURT: Same ruling.

BY MR. BARFIELD:

Q. And if the law does require that speech restrictions be considered as a last resort under these circumstances, is it true that the Legislative Council has not considered speech restrictions as a last resort?

MR. COLBERT: Same objection.

THE COURT: Same ruling.

THE WITNESS: We haven't considered any changes to the recruiting rule.

* * *

[2861]

* * *

Q. Now let's talk about tickets for just a minute, a couple of short questions.

You agree that on the tickets that the evidence was that Brentwood Academy and Coach Flatt did not know that these tickets were given to students?

A. At the time, no, sir, I don't think -- yes, sir, you're correct.

* * *

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No. 06-427

In the Supreme Court of the United States

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION,
PETITIONER,

v.

BRENTWOOD ACADEMY,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

The Tennessee Secondary School Athletic Association is a voluntary association, composed primarily of public schools, which adopts rules governing athletic competition between its members. Brentwood Academy is a private school that voluntarily chose to join TSSAA and agreed to abide by its rules, but now claims a First Amendment right to continue competing while violating TSSAA's rule against the use of "undue influence" in recruiting students for athletic purposes. The Sixth Circuit agreed, reasoning that Brentwood's voluntary agreement is irrelevant to the constitutional analysis and declining to recognize any substantial state interest in fair and level athletic competition. The question presented in this case is:

Whether the Sixth Circuit correctly held, in conflict with decisions of this Court and other courts of appeals, that TSSAA violated the First Amendment and Due Process rights of Brentwood Academy when it imposed contractual penalties for violations of the recruiting rule that Brentwood agreed to follow.

RULE 29.6 STATEMENT

Petitioner Tennessee Secondary School Athletic Association does not have a parent corporation, and no publicly held company owns 10% or more of Tennessee Secondary School Athletic Association's stock.

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OPINIONS BELOW

The Sixth Circuit's earlier panel opinion is reported at 262 F.3d 543 (Pet. App. 1-24). The district court's opinion on remand is reported at 304 F. Supp. 2d 981 (Pet. App. 25-77). The Sixth Circuit's subsequent opinion is reported at 442 F.3d 410 (Pet. App. 78 -153).

JURISDICTION

The Sixth Circuit denied TSSAA's petition for rehearing and rehearing *en banc* on June 27, 2006 (Pet. App. 154-155). The petition for a writ of certiorari was filed on September 25, 2006, and was granted on January 5, 2007. 127 S. Ct. 852. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The First Amendment to the Constitution provides that "Congress shall make no law ... abridging the freedom of speech." The Fourteenth Amendment to the Constitution provides that "No State shall ... deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

The Tennessee Secondary School Athletic Association's ("TSSAA") member schools have agreed that one of the rules for their high school athletic league should be a mutual agreement not to use "undue influence ... to secure or to retain a student for athletic purposes." JA 181.[1] High school athletic associations in every other state have similar rules, because there is a broad consensus among educators that recruiting for athletics harms students and undermines the educational purposes of high school sports. The recruiting rule also plays an important role in maintaining a fair and level playing field. It may limit "speech" in a sense, but so does the rule that a coach too vigorously protesting a referee's call will be ejected. Respondent Brentwood

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[1] "JA" refers to the joint appendix filed in this Court. "CAJA" refers to the joint appendix filed in the court of appeals. "Pet. App." refers to the petitioner's appendix accompanying the petition for certiorari.

Academy voluntarily chose to join TSSAA and promised to respect its rules, and then committed several clear violations of the recruiting rule. After TSSAA imposed a sanction, Brentwood initiated a decade of constitutional litigation claiming that its violations should have been treated as a case of "no harm, no foul." It claims, in essence, to have a constitutional right to compete in TSSAA's tournaments without following the rules that set the terms of competition, and victory, for others.

The Sixth Circuit found a First Amendment violation here only by making several fundamental errors. First, it held that the voluntary and contractual nature of Brentwood's relationship with TSSAA is irrelevant to the constitutional analysis—*i.e.*, that there is no difference between the rules of a voluntary athletic league and "time, place, and manner" restrictions on speech imposed without consent on the general public. Second, the court held that TSSAA has no substantial governmental interest in protecting fairness or competitive balance in the athletic competition it oversees. Third, even after acknowledging that TSSAA's recruiting rule serves important state interests in general, the Sixth Circuit wrongly second-guessed TSSAA's judgment about whether enforcement was merited on these particular facts.

The Sixth Circuit also held that Brentwood received inadequate notice of certain evidence against it, in violation of procedural due process. Brentwood received exactly the (extensive) notice it was entitled to under TSSAA's constitution and the membership contract, and is entitled to no more. The court's due process reasoning is essentially a back door holding that Brentwood was entitled to decisionmakers who knew nothing about the facts not elicited at the hearing itself. That is contrary to settled law.

The Sixth Circuit's misinterpretation of constitutional principles injects federal courts into second-guessing the internal operations of voluntary athletic associations, a role for which federal courts are particularly miscast. And, on a practical level, it threatens to end voluntary athletic

competition between public and private schools.

The Role of TSSAA

Interscholastic athletic competition cannot be conducted effectively through a system of ad-hoc pickup games. It requires a common set of rules to establish, define, and coordinate competition. This Court held in *Brentwood Academy v. TSSAA*, 531 U.S. 288, 291 (2001) ("*Brentwood I*"), that TSSAA should be treated as a state actor due to the involvement of public school officials in the organization. This Court nevertheless did not question the following facts concerning TSSAA's structure and activities.

TSSAA is a voluntary membership organization through which members self-regulate their sports competition and establish common rules to promote the educational ideals of interscholastic athletics. *Id.*; CAJA 119-20. TSSAA's members are predominantly public schools, *Brentwood I*, 531 U.S. at 291, but private schools that agree to abide by TSSAA's constitution and bylaws are also permitted to join. Members have the common goal of participating in athletic competition, but can have antagonistic and adversarial interests. Not all schools in Tennessee subscribe to TSSAA's particular philosophy. Members have terminated their relationships with TSSAA to pursue different objectives, and many private schools in Tennessee join other athletic associations with different values and different rules. JA 432-34, 450.

TSSAA's only authority over its members derives from each member's annual, voluntary decision to participate in TSSAA by executing a membership contract. *Brentwood I*, 531 U.S. at 291 ("[n]o school is forced to join"); Pet. App. 79 ("TSSAA is a voluntary association"); JA 434-35, 449-50. By executing that contract, members agree to abide by TSSAA's bylaws and grant TSSAA the authority "to suspend, to fine, or otherwise penalize any member school for the violation of any of the rules of the Association or for other just cause." JA 147. No Tennessee law requires any school, public or private, to engage in interscholastic

athletics at all, much less to join TSSAA. The Tennessee statutes pertaining to public education are silent with regard to interscholastic athletic competition.

TSSAA is largely run by its executive director and is overseen by a Legislative Council that adopts rules for the organization, and a Board of Control that enforces the rules. The Legislative Council and Board of Control each consist of nine members who must be high school principals, vice principals, or school administrators from either public or private schools. *Brentwood I*, 531 U.S. at 291. The Board members are elected by popular vote of TSSAA members from nine athletic districts across the state and represent the interests of all schools—public and private—within their district. Although TSSAA's constitution and bylaws do not provide for additional Board members, TSSAA's practice has been to allow non-voting representatives from seven different organizations, JA 272, one of which is the State Board of Education, *Brentwood I*, 531 U.S. at 300, to attend and participate at meetings if they choose. No ex officio member attended either of Brentwood's hearings or participated in TSSAA's deliberations. CAJA 3084.

TSSAA's operating budget includes approximately $1.6 million in annual gross receipts. The Sixth Circuit found, and this Court did not dispute, that "TSSAA receives no funding from the state." *Brentwood Acad. v. TSSAA*, 180 F.3d 758, 762 (6th Cir. 1999). Instead, TSSAA's funds are derived primarily from gate receipts of tournaments which TSSAA sponsors for its member schools. *Brentwood I*, 531 U.S. at 291. Only 4% of TSSAA's annual budget comes from the membership dues paid by its public and private member schools. JA 284, 281. Like any other private entity, TSSAA must contract with the state to use state-owned facilities, and it must register with the Tennessee Department of Revenue and be subject to the same amusement and sales taxes assessed on private taxpayers. JA 281, 284-85.

Brentwood's Voluntary Participation in TSSAA

Respondent Brentwood Academy is a small private

academy with a prominent athletic program. CAJA 118. Since joining TSSAA for the first time in 1972, Brentwood has won nine TSSAA state football championships, usually competing against much larger schools. CAJA 1155. Brentwood has always acknowledged that its relationship with TSSAA is contractual in nature. Its briefs to the district court invoked contract law and emphasized that "[a]s a member of TSSAA, Brentwood Academy and other member schools have certain contract rights. Among those rights is the right to participate fully in the activities of the TSSAA unless there is some cause for a change in status." Brentwood Mem. at 60, No. 3:97-1249, Doc. No. 28 (M.D. Tenn. June 1, 1998). Brentwood has likewise acknowledged that joining TSSAA is an entirely voluntary choice. CAJA 1406, 574. Its Headmaster Emeritus Bill Brown testified:

> Q. All right. Now Brentwood Academy as of 1996 and '97 and throughout your tenure as headmaster was a voluntary member of TSSAA, correct?
>
> A. Yes, sir.
>
> *****
>
> Q. And Brentwood Academy was not under any compulsion to join, it did so voluntarily, correct?
>
> A. Yes, sir.
>
> Q. All right. And when Brentwood Academy joined TSSAA, it agreed to abide by the rules and decisions of TSSAA, each year, right?
>
> A. Yes, sir.

JA 448-49. Current Headmaster Curt Masters confirmed that Brentwood decides each year whether or not to join TSSAA. JA 445. When asked whether Brentwood was free to leave TSSAA if it enacted a rule that conflicted with Brentwood's mission, Masters replied "yes." JA 446.

TSSAA's Recruiting Rule

TSSAA's bylaws contain a "recruiting rule" that prohibits "the use of undue influence ... to secure or retain a student for athletic purposes...." JA 181. The bylaws contain several pages of guidance that explain the rule's scope and application. JA 181-85. For example, the

guidance warns that "a coach may not contact a student or his or her parents prior to his enrollment in the school," and cites as an example of prohibited conduct "any initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/athlete...." JA 181-82. The bylaws also define "enrolled" as having "attended 3 days of school." JA 182; CAJA 1918.

High school athletic associations in every other state all have similar recruiting prohibitions. Br. Nat. Fed. of State High Sch. Ass'ns ("NFHS") at 2. And TSSAA's evidence at trial confirmed that the rule advances three important goals: (1) preventing the exploitation of children; (2) ensuring that athletics remain secondary to academics; and (3) fostering a level playing field among its participating schools.

First, sports recruiting of young athletes has led to a pattern of abuses in the past. CAJA 1665-67, 1338-39. Four nationally renowned experts confirmed at trial that the recruiting rule serves to guard against exploitation of children. CAJA 1748-51, 1564, 1658, 1338. Indeed, Brentwood's own expert acknowledged that preventing such exploitation is a compelling interest. CAJA 1205.

Second, the rule helps to preserve the primacy of academics over athletics. CAJA 1564-65, 657, 706. Otherwise the ills that have befallen many Division I colleges with elite athletic programs would surface at the high school level, and pose an even greater threat of harm to students. CAJA 1569, 1604, 1609, 1666, 1338, 1351. Even Brentwood's Headmaster Emeritus Bill Brown conceded that athletic recruiting is contrary to the purposes of high school sports and education, and should be prohibited. CAJA 607, 614. Brown insisted at trial that all athletic recruiting should be prohibited. *Id.*

Third, TSSAA's recruiting rule promotes fair and balanced athletic competition. Many different types of schools have come together to compete through TSSAA, and the entire enterprise depends on the ability to establish

a reasonably level playing field. The evidence demonstrated that TSSAA's recruiting rule is designed to achieve that goal. CAJA 1728-32, 1564-65, 1571-74, 1306, 1311-12, 1324, 1086, 1163-65, 1636-38, 606-07, 1350-51, 1102. Brentwood Headmaster Emeritus Brown acknowledged that the recruiting rule protects a level of fairness in athletic competition that otherwise could not exist, CAJA 605-06, 615, and that, without rules to prevent athletic recruiting, private schools that are not restrained by geographic attendance zones or dependent on limited tax revenues would have unfair advantages over public schools. CAJA 615. The recruiting rule is therefore necessary to enable public schools and private schools to compete fairly within the same organization. Witnesses also confirmed that both the perception and reality of fairness and competitive balance are essential to the educational goals of high school athletics. As TSSAA expert witness Jack Roberts testified:

> If you do not have a level playing field, the competition cannot be fair, you can only have hard feelings result. All who participate want a fair chance to succeed .... The team doesn't want to be humiliated week after week by teams that are much more loaded in talent and powerful. ... There won't be as many youngsters coming out for the team. When that happens, schools lose a tremendous vehicle, sports, for reaching and motivating young people.

JA 405-06.

Brentwood's Violation of the Recruiting Rule

In 1997, TSSAA received allegations about recruiting misconduct by individuals associated with Brentwood, including its head football coach Carlton Flatt and a booster named Bart King. CAJA 1025, 1437. Between May 30 and July 29, 1997, TSSAA Executive Director Ronnie Carter exchanged a series of letters and phone calls with coach Flatt and Headmaster Brown about those violations, and Carter and one of his assistants met personally with both Flatt and Brown. JA 120-33, 204-29, 238-44.

On July 15, 1997, Brentwood provided TSSAA a copy of a letter Coach Flatt had sent to a dozen eighth-grade boys enrolled at other middle schools inviting them to attend spring football practice at Brentwood. JA 119. Brentwood acknowledged that Coach Flatt had followed up those letters with personal telephone calls to the home of each boy. JA 219-20. The boys had indicated an intention to attend Brentwood the next fall, but were not yet "enrolled" at Brentwood as defined in the bylaws (a definition of which Brentwood's admissions director testified she was aware, CAJA 558). Every year some students change their minds before matriculating (including one of the boys who was the subject of these recruiting allegations), and students who have not yet received their financial aid package do not even forfeit a deposit. CAJA 561-63, 582-84, 591.

Numerous athletic officials and experts explained at trial why this invitation to spring practice represented a form of recruitment that would tend to unduly influence the boys who received it. CAJA 1741-42, 1576-79, 1673, 1345-47, 1064. Coach Flatt's letter effectively treated twelve boys as his own players, even though they were not yet Brentwood students, by describing himself as "Your Coach," and by enticing them with the opportunity to be given "equipment" for "your new team." JA 119; CAJA 1742 (expert testifying to powerful impact on students of being enticed with new equipment and uniforms). Moreover, Flatt's letter told the students attending other schools that "I do feel that getting involved as soon as possible would definitely be to your advantage," JA 119, which sent the message that the opportunity to play in the future could depend on attendance at Brentwood's spring practice. CAJA 1577, 1347. Such suggestions tend to have great effect because of the sway that coaches have over young student athletes. CAJA 1166-67, 1741. Coach Flatt himself acknowledged the influence his letters had. JA 301-02. Twelve eighth-grade boys attending other schools received Coach Flatt's letters and calls. All twelve attended at least some of Brentwood's spring football practices, some missing other activities at

the schools they were attending. Pet. App. 84; CAJA 527.[2]

TSSAA's Internal Hearing Procedures

TSSAA's constitution provides that a school charged with violating TSSAA regulations "shall be notified of such charges," and that "if a hearing is desired by the school involved ... provisions will then be made for such hearing." JA 141. But the constitution does not require TSSAA to present all of its evidence of infractions on the record in a public hearing. It only requires that "a member school shall not be suspended from membership without first being given the opportunity *to present its case* at a hearing ... [which] shall be conducted by the Executive Director in the presence of two or more members of the TSSAA Board of Control." *Id.* (emphasis added). Finally, "any decision of the Executive Director may be appealed to the Board of Control." *Id.*

The courts below did not make any finding that TSSAA's investigation and adjudication failed to comply with the procedures established in its constitution and bylaws and agreed upon by all members. Nor could they have done so. The investigation began with written correspondence between TSSAA's executive director Ronnie Carter and Brentwood. Pet. App. 83-84. This correspondence put Brentwood on notice of the various issues and allegations with which TSSAA was concerned, and gave Brentwood an opportunity to respond to each issue in writing. *See, e.g.*, JA 121, 124-33, 204-29. This correspondence included repeated, express references to Bart King, who was alleged to have been recruiting children—including a highly sought-after recruit named Jacques Curry—on Brentwood's behalf. JA 121, 126, 207-

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[2] Another concern animating the recruiting rule and its application in such circumstances is that, because students have not yet attended their new high school, their financial aid packages typically will not yet have been finalized. Soliciting middle school students to attend spring practice gives schools incentives to screen students in football practice, and make financial aid decisions accordingly. One witness, an expert in sports ethics, characterized the invitations as "try out" invitations. CAJA 1749.

210, 218-27. It also included lengthy, written responses from Brentwood that included discussion of King. JA 120-23, 128-33, 212-29. On July 29, 1997, Executive Director Carter made an initial determination based on Brentwood's written submissions that Brentwood had violated the recruiting rule and the TSSAA limitation on off-season practice. That assessment was based on all of the incidents discussed by the parties, including the activities of King. JA 238-44. Brentwood's football and basketball teams were excluded from tournament play for two years, other teams were excluded from tournaments for one year, and the school was placed on probation and "fined" $3,000. JA 243. As a result of his recruitment by King, Jacques Curry was declared ineligible to participate in athletics at Brentwood. Three other students were also declared ineligible because of recruiting violations. *Id.*

With the aid of counsel, and in accordance with TSSAA's bylaws, Brentwood then pursued a hearing before Carter and an advisory panel of three TSSAA Board of Control members. At this August 13, 1997 hearing, Brentwood presented a bound set of twenty-five exhibits that contained documents and sworn statements from witnesses, including an affidavit from King. Brentwood's attorney made a lengthy presentation with testimony and argument addressing each violation. *E.g.*, JA 245-53. Following that hearing, Carter modified his initial decision, but Curry and two other students remained ineligible. JA 254-58.

Brentwood then pursued a *de novo* appeal under TSSAA bylaws to the entire TSSAA Board of Control on August 23, 1997. Again represented by counsel, Brentwood made a lengthy presentation that included live testimony of witnesses and the same sworn statements addressing each violation, including the violations that pertained to King. CAJA 3084-3186. Brentwood's attorney presented an affidavit from King and a sworn statement from Jacques Curry about Bart King. CAJA 2812-14, 2967-71. Curry offered live testimony about his relationship with King. CAJA 3159-64. Brentwood's attorney also brought Mr.

King in person to the hearing but did not call him to testify. CAJA 1477, 1479. Immediately after Curry's testimony about King, Brentwood's attorney concluded:

> Mr. Nebel: Any other questions? That's going to be it for our proof. If I could make just a few concluding remarks.
>
> By the way, we have Bart King here to answer any questions. And it was our intention to put him on, but I don't know if you all are interested in extending for five minutes to hear from Bart King or not. He's here if you want him.
>
> Mr. Carter: No.
>
> Mr. Nebel: No. All right.

JA 267. Brentwood's attorney acknowledged having had ample opportunity to prepare for the hearing, and testified that he was not prevented from presenting anything he wished to present. JA 396-401.

After hearing Brentwood's arguments, the Board of Control issued a new and final decision. The Board of Control found that Brentwood: (1) violated the recruiting rule as a result of Coach Flatt's letters and calls; (2) violated the recruiting rule by giving free tickets to a Brentwood football game; and (3) violated the practice rule in boys' basketball. JA 269-71. Each finding was based upon information that Brentwood supplied to TSSAA. It placed Brentwood's athletic program on probation for four years, excluded the boys' basketball and football teams from TSSAA tournament play-offs for two years (regular season play was unaffected), and assessed a $3,000 "fine." (TSSAA bylaws do not provide a mechanism to compel payment, and to date the "fine" has not been paid. CAJA 867.) The Board reinstated Curry's eligibility, which had previously been revoked due to King's alleged recruiting. JA 271.

Brentwood felt the punishment was too severe, and filed this lawsuit alleging that the recruiting rule violated its First Amendment rights and that TSSAA's enforcement

violated both substantive and procedural due process.[3]

Judicial Proceedings

1. On July 29, 1998, the district court granted partial summary judgment to Brentwood and permanently enjoined TSSAA from continued enforcement of the recruiting rule. The district court held that the recruiting rule was unconstitutionally vague and was a content-based restriction on speech that failed strict scrutiny. *Brentwood Acad. v. TSSAA*, 13 F. Supp. 2d 670 (M.D. Tenn. 1998). The Sixth Circuit reversed, ruling that TSSAA did not act under color of state law. *Brentwood Acad.*, 180 F.3d 758. This Court reversed, concluding in a 5-4 decision that TSSAA was a state actor because of its "entwinement" with the State Board of Education and public schools. *Brentwood I*, 531 U.S. 288.

2. On remand to the Sixth Circuit, TSSAA argued that because of the contractual relationship between Brentwood and TSSAA, the *Pickering-Connick-Umbehr* line of cases, which governs retaliation against government employees or contractors because of speech, provided the appropriate analytical framework here. *See Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983); *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668 (1996). Under that standard, TSSAA argued that Brentwood's speech was not on a matter of public concern, and that application of the recruiting rule to Brentwood was reasonable in light of the rule's legitimate objectives.

The Sixth Circuit disagreed. It held that the voluntary and contractual nature of the relationship between

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[3] Brentwood is also asserting an equal protection claim, as well as an antitrust claim that is premised on the theory that a voluntary athletic association violates the Sherman Act if it creates different divisions for its participants. CAJA 270-72. The district court dismissed the antitrust claim on immunity grounds, ruling that the facts underlying this Court's decision that TSSAA was a state actor supported the conclusion that it was entitled to immunity under *Parker v. Brown*, 317 U.S. 341 (1943). CAJA 411-12. The Sixth Circuit reversed the immunity ruling, leaving the equal protection and antitrust claims still active. Pet. App. 129.

Brentwood and TSSAA was relevant only to waiver—and that Brentwood had not specifically waived its right to file a First Amendment lawsuit. Pet. App. 7-8. The court briefly considered the potential relevance of *Umbehr* and *Pickering*, but held that the recruiting rule should instead be analyzed as a "time, place, and manner" restriction on speech subject to intermediate scrutiny. It reasoned that because TSSAA must prove that its recruiting rule serves important governmental interests, *Pickering*'s requirement that the speech must be on a "matter of public concern" was satisfied by definition. *Id.* at 9. The court rejected Brentwood's argument that the recruiting rule is facially overbroad or vague, because the rule "is accompanied by the equivalent of two full pages of question-and-answer explanations and guideline interpretation." *Id.* at 20. Since "Brentwood's alleged violations are explicitly listed as prohibited conduct" in that commentary, *id.* at 19, the rule "as a whole ... gives reasonable notice of what is prohibited, especially as applied to Brentwood." *Id.* at 20. The Sixth Circuit then remanded for trial under intermediate scrutiny. *Id.* at 14-15, 21-13.

3. The district court conducted a ten-day trial, and entered judgment in Brentwood's favor on January 13, 2003. The court acknowledged TSSAA's important interests in preventing exploitation of children and keeping athletics secondary to academics, but held that TSSAA's interest in promoting a level playing field was not as important, Pet. App. 48-49, and that enforcement of the recruiting rule against Brentwood's particular actions was not narrowly tailored. *Id.* at 49-55. The court found that Coach Flatt's letter and calls "do not violate the TSSAA's legitimate governmental interests." *Id.* at 50. It found instead that the communications were "essentially post-recruiting activity" because most students who agree to enroll ultimately do attend. *Id.* at 52. The court also ruled that TSSAA violated Brentwood's due process rights. *Id.* at 65-71.

4. On appeal, a divided panel of the Sixth Circuit affirmed in all relevant aspects. Pet. App. 107, 119-20. The

panel majority held that the "applicability of the First Amendment ... does not vary depending on ... whether the relationship between the government and the speaker is voluntary or contractual," *id.* at 94, and that the deferential analysis applied to the termination of public employees or contractors in cases like *Pickering* and *Umbehr* is limited to the particular types of contracts involved in those cases, *id.* at 91-93. It also treated this Court's distinction between "sovereign power" and "contractual power" in *Umbehr* as "dicta." *Id.* at 92-93. The panel held that TSSAA "can cite to no evidence to support the notion that ensuring that high schools compete in interscholastic sports in an equitable manner is a substantial state interest ...." *Id.* at 100. It agreed that "TSSAA has substantial state interests in keeping athletics subordinate to academics and preventing the exploitation of student athletes," *id.*, but held that "the TSSAA's use of its discretion to punish Brentwood . . . was not a narrowly tailored way to keep athletics subordinated to academics at Brentwood or ensure that the student athletes ... were not being exploited." *Id.* at 102.

In addition, despite the evidence that Brentwood was fully aware of the issues involving Bart King and had received all the process it was due under its membership contract with TSSAA, the panel found a procedural due process violation because members of TSSAA's Board of Control discussed the King allegations with TSSAA staff investigators after the hearing. *Id.* at 116-20. Although the Sixth Circuit recognized that in this context Brentwood has no due process right to decisionmakers without outside knowledge of the events, it nonetheless concluded that such discussions involved improper "*ex parte*" evidence.

Judge Rogers dissented, explaining that "[d]issatisfaction with application of game rules does not become a First Amendment violation merely because the rule involves speech." *Id.* at 132. Judge Rogers would have held that "Brentwood in this case gave up its right to engage in certain types of speech." *Id.* at 134. He also explained that there was no "unconstitutional conditions"

defect in Brentwood's agreement to abide by the recruiting rule, because that rule is reasonably related to the competitive athletic program overseen by TSSAA and because the "speech" in question—being purely a matter of private concern—clearly failed the *Pickering* test. *Id.* at 138-39. Judge Rogers also noted that the majority erred by second-guessing whether Brentwood's specific violation actually threatened the substantial state interests underlying that rule. "The anti-recruiting rules, like restrictions on adult oriented business, operate in the aggregate and are judged based on the overall effect on speech; a city is not required to show that every cabaret affected by an ordinance causes an increase in crime and prostitution before the ordinance can be applied to that business." *Id.* at 144. Judge Rogers also disagreed with the majority's "remarkable" conclusion that competitive equity is not a substantial state interest: "it can hardly be argued that TSSAA needs to provide evidence for the obvious proposition that more evenly balanced high school football matches are in the public interest." *Id.* at 145 n.2. Finally, Judge Rogers found no due process violation. *Id.* at 147-48.

SUMMARY OF THE ARGUMENT

The Sixth Circuit's decision is flawed in many respects, but the unifying theme is its failure to appreciate the legal significance of the voluntary and contractual relationship between Brentwood and TSSAA. The Sixth Circuit wrongly applied stringent constitutional standards designed to constrain the use of sovereign power against unconsenting members of the general public. Those standards are inappropriate when, as here, the plaintiff agreed by contract to abide by specific rules and procedures as a condition of participating in a voluntary athletic league.

I. The Sixth Circuit held that the "applicability of the First Amendment ... does not vary depending on ... whether the relationship between the government and the speaker is voluntary or contractual." Pet. App. 94. When the government uses sovereign power to restrict the speech

rights of the general public, those restrictions are judged by stringent First Amendment standards—including the "time, place, and manner" rules applied by the Sixth Circuit here. But TSSAA has no sovereign power to impose anything on a private school, and it did not impose anything on Brentwood. The government is allowed to offer citizens a "reasonable choice" of discretionary benefits with conditions attached, that citizens are free to decline.

"Unconstitutional conditions" law is not tidy, but Brentwood cannot possibly prevail under this Court's tests, for three reasons. First, in the most analogous cases, this Court has simply enforced up-front limitations on speech required as a condition of participation in voluntary government programs. This Court enforced a CIA agent's pre-employment promise to submit any future writings to pre-publication screening—which, if imposed on the general public, would be a nakedly unconstitutional prior restraint. *Snepp v. United States*, 444 U.S. 507 (1980). It also held that the federal government can offer subsidies for family planning programs on the condition that persons speaking within the program agree that they will not discuss abortion. *Rust v. Sullivan*, 500 U.S. 173 (1991); *see also Grove City College v. Bell*, 465 U.S. 555, 575 (1984) ("Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept."). Brentwood voluntarily chose to join TSSAA in order to pursue a dream of statewide athletic glory that it could not achieve by joining a smaller private league or by organizing its own independent games. It voluntarily agreed to TSSAA's conditions, one of which was that it not recruit eighth graders for athletic purposes. That condition is clearly reasonable, as demonstrated by the fact—underscored by *amici*—that public high school leagues across the country have similar rules. That should be the end of the matter.

Second, even in the absence of any express agreement or clear rules defining the scope of prohibited speech, this Court has held that public employees or government

contractors who claim to have been sanctioned because of speech have no First Amendment claim unless they can surmount an initial hurdle by proving that they were speaking "as a citizen, on a matter of public concern." That bright-line rule ensures that the government is not constantly burdened and distracted by litigation over speech that is not at the core of the First Amendment. Brentwood flunks both aspects of that categorical test. It was not speaking "as a citizen" because its speech was not abstract commentary, but active participation in the competitive athletic endeavor overseen by TSSAA, as defined by the game rules Brentwood itself agreed to. And Coach Flatt's opinion that these particular middle school students would benefit from attending Brentwood's spring football practice clearly is not a matter of any public concern.

Finally, even if Brentwood could survive those threshold requirements, this Court's cases would then require a balancing of TSSAA's legitimate interests in this area against Brentwood's interests in speaking in this particular manner. That balance clearly favors TSSAA here.

II. Even if the Sixth Circuit had been right to apply "time, place, and manner" standards, it misinterpreted the doctrine. First, the court gave far too little weight to TSSAA's substantial state interests, and wrongly discounted one of them—competitive equity—entirely. Perhaps the Sixth Circuit was confused by the "state action" posture of this case, because it is certainly true that state governments do not usually concern themselves with parity and fairness in high school sports. But if voluntary athletic leagues are to be state actors, then the principal concerns of those leagues must be considered substantial *governmental* interests as well. Reasonably balanced and fair competition is essential to all athletic contests, and particularly serves the educational interests of high school sports by encouraging participation and preventing dangerous and dispiriting lopsided contests. Since the recruiting rule is narrowly tailored to that interest, a holding that competitive equity is a substantial interest resolves this case.

The Sixth Circuit also erred by second-guessing TSSAA on whether enforcement of the rule was appropriate here. This Court has never required state actors enforcing a constitutionally justified general rule to prove that the particular violation at issue threatened the rule's purposes.

III. The Sixth Circuit's due process analysis also wrongly imports stringent constitutional standards into a contractual setting where those standards are inappropriate. Brentwood received abundant and specific notice of the nature of TSSAA's concerns and the allegations against it—notice specific enough to allow it to put on an extensive case in response. That is all TSSAA's constitution, the membership contract Brentwood signed, or due process principles require in this context. Brentwood points to a disputed allegation that TSSAA's Board may have consulted with its own investigative staff members during deliberations, and the Sixth Circuit held that any such communications were an improper "*ex parte*" communication of additional "evidence" that Brentwood lacked an opportunity to respond to. That fundamentally misconceives the nature of this hearing. Brentwood was not entitled to decisionmakers who had no prior involvement in the investigation and formed their opinions based solely on whatever was presented at the hearing itself. The hearing was an opportunity for Brentwood to tell its own side of the story, but there was no requirement that TSSAA detail all the information it had learned and might consider. The Sixth Circuit essentially accepted Brentwood's argument that it is entitled to the elaborate hearing process afforded in *Goldberg v. Kelly*, 397 U.S. 254 (1970)—including a requirement that TSSAA present and prove its own case, tender its staff for cross-examination, and base any decision solely on the evidence elicited during an adversarial hearing. This Court has never extended *Goldberg* to a context remotely like this one. Even the tenured public employee firing cases the Sixth Circuit relied upon did not go this far.

IV. Finally, TSSAA respectfully submits that this Court's prior state action analysis has proven to be

unworkable and should be reconsidered. Federal courts should not be in the business of trying to apply constitutional standards to the internal operations of voluntary high school athletic leagues that do not exercise real sovereign power. This Court can correct the Sixth Circuit's particular doctrinal errors and confusion here, but the only consistent way to spare litigants and the courts from the time and expense of cases like this one is to recognize that decisions like these are not fairly attributable to the state. This Court's "entwinement" analysis, focusing on the structure of the organization rather than on the particular action challenged, was a departure from traditional state action analysis. *Stare decisis* does not prevent this Court from restoring the prior fabric of the law after such a recent departure.

This Court's state action analysis is particularly unworkable and unfortunate in this context because subjecting athletic associations like TSSAA to constitutional litigation will do little good and plenty of harm. The public schools of Tennessee and every other state are entitled to form athletic leagues and agree upon rules for competition, including rules that restrict the speech of participants, without inviting years of litigation. The public schools themselves have no constitutional rights, and under this Court's precedents public school employees cannot complain about restrictions on "speech" in the course of performing their job duties. Public schools are under no obligation to permit private schools to join their leagues, and will not do so if it exposes them or the league to catastrophically expensive litigation. TSSAA does not have access to state financial or legal resources; its budget comes from modest dues and gate receipts at high school tournament games. This case has stretched on for nearly a decade. Its executive director escaped personal financial liability only because of a qualified immunity ruling that may not be available the next time, because of this case. And TSSAA still faces remand proceedings on an equal protection challenge and a potentially crushing fee shifting award under § 1983 if

Brentwood prevails on any of its scattershot claims. Unless this Court fashions a workable solution, the ultimate fruit of this litigation may be the end of voluntary public-private interscholastic athletic competition (or joint activities) in this country. *See* Br. of Activities Ass'ns, at 15-16.

ARGUMENT

I. THE RECRUITING RULE IS NOT AN UNCONSTITUTIONAL CONDITION

The Sixth Circuit applied intermediate scrutiny and treated TSSAA's recruiting rule exactly like a general speech restriction imposed on the non-consenting public under the state's police powers. But when restrictions implicating constitutional rights arise as conditions upon a citizen's voluntary or contractual participation in a government program or workplace, this Court has not applied heightened scrutiny. It employs "unconstitutional conditions" analysis to balance the government's legitimate interests against the individual's interest in avoiding indirect burdens on the exercise of constitutional rights.

In this Court's most recent discussion of the unconstitutional conditions doctrine, it began by acknowledging its holding in *Grove City* that conditioning federal funds on compliance with Title IX "warrant[ed] only brief consideration" because "Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 126 S. Ct. 1297, 1306 (2006) ("*FAIR*") (quoting *Grove City*, 465 U.S. at 575). This Court explained that a speech-burdening condition attached to discretionary government benefits violates the First Amendment only if it "goes beyond the 'reasonable' choice offered in *Grove City* and becomes an unconstitutional condition." *Id.* at 1307.

In deciding whether conditions represent a "reasonable choice" under *Grove City* and *FAIR* or an unconstitutional burden on First Amendment rights, this Court has looked to the severity of the burden in relation to the government's

legitimate purposes,[4] the relationship between the benefit offered and the condition imposed,[5] and whether the choice is coercive.[6] In two contexts, however, this Court has found a complex balancing of factors to be unnecessary, and has instead given great deference to the government's legitimate interests in managing its operations and programs. This case implicates both of those special contexts. But under any standard, voluntary membership in TSSAA offers a "reasonable choice" as a matter of law.

First, this Court has given great deference to the government's right to define the scope of its own programs, and has recognized that citizens have no constitutional right to change the nature of discretionary programs they have voluntarily joined. A decision to participate in the government's program effectively waives any challenge to the conditions defining its scope. TSSAA and its members have made the collective decision that the recruiting rule is a central feature of the particular athletic association they are offering, and Brentwood agreed to that rule in advance. TSSAA is entitled to substantial deference concerning its own goals and mission, and to its conclusion that the

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[4] *See, e.g., O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 719 (1996) ("the inquiry is whether the [political party] affiliation requirement is a reasonable one"); *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 295 (1958) (government "may establish and impose reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof").

[5] *South Dakota v. Dole*, 483 U.S. 203, 208 (1987) (spending conditions must be "germane" to the activity being subsidized); *Dolan v. City of Tigard*, 512 U.S. 374, 386 (1994) (condition acceptable where an "'essential nexus' exists between the 'legitimate state interest' and the permit condition exacted by the city") (citation omitted); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987) (condition unrelated to government's purpose can amount to "'an out-and-out plan of extortion'"); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 236 (1977), and *Keller v. State Bar of Cal.*, 496 U.S. 1, 13-14 (1990) (both permitting compelled payment of fees to fund activities "germane" to the programs).

[6] *Speiser v. Randall*, 357 U.S. 513, 519 (1958) (condition not permissible because it "will have the effect of coercing the claimants to refrain from the proscribed speech").

recruiting rule is closely related to those goals and important to achieving them. So long as the rule is reasonable under that deferential standard, Brentwood's voluntary choice to join waives any challenge to the rule.

Second, this Court has identified settings, such as employment or schools, in which the government needs discretion to conduct its operations efficiently and without repeated judicial interference.[7] This Court has concluded that it is frequently reasonable—indeed essential—for the government to supervise potentially disruptive speech of its employees and contractors, and that judicial oversight is appropriate only if the speech at issue implicates core constitutional values. In such cases, this Court has held that sanctions for speech merit First Amendment review only if, at a minimum, the plaintiff was speaking "as a citizen, on a matter of public concern." That categorical rule is appropriate here, and it forecloses Brentwood's claim.

Finally, even if no special deference is due to TSSAA, the recruiting rule is nevertheless reasonable. The residual balancing test for evaluating potential "unconstitutional conditions" clearly favors TSSAA.

A. The Recruiting Rule Defines TSSAA's Program, and Brentwood's Express Agreement Waives Any First Amendment Right to Violate It

This case involves the most straightforward application of the unconstitutional conditions doctrine: a specific, upfront limitation on speech that defines the very program being offered, and to which a voluntary participant expressly consents in advance. When a speech-impacting

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[7] *Branti v. Finkel*, 445 U.S. 507, 517 (1980) ("First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency."); *Umbehr*, 518 U.S. at 676 ("'The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer'") (citation omitted).

condition plays a role in defining the benefit being offered, and is agreed to up front, the reasonableness of the condition is entitled to great deference, in keeping with the government's right to define the scope of its own programs.

Rust v. Sullivan involved a statute authorizing an agency to make grants to family planning services subject to an up-front constraint that those funds not be used to engage in abortion-related speech. This Court noted that the challenged speech restrictions "are designed to ensure that the limits of the federal program are observed," and held that "when the Government appropriates public funds to establish a program it is entitled to define the limits of that program." 500 U.S. at 193-94. Participants who chose to accept the funding were not barred from all abortion-related speech, but rather were merely required to "keep such activities separate and distinct from Title X activities." *Id.* at 196. This Court emphasized that any limitation on the plaintiffs' speech was "a consequence of their decision to accept employment in a project, the scope of which is permissibly restricted by the funding authority." *Id.* at 199.

This Court applied and reaffirmed *Rust* in *United States v. Am. Library Ass'n*, 539 U.S. 194 (2003). There, Congress had appropriated funds to assist libraries in providing internet research resources, with the condition that the libraries accepting funds install pornography filters on their public computers. This Court held that Congress's programs "were intended to help public libraries fulfill their traditional role of obtaining material of requisite and appropriate quality for educational and informational purposes." *Id.* at 211. Congress identified the scope of the program it intended to offer, and, just as in *Rust*, "Congress may certainly insist that these 'public funds be spent for the purposes for which they were authorized.'" *Id.* at 211-12 (quoting *Rust*, 500 U.S. at 196). The "reasonable choice" requirement of *Grove City* thus was easily satisfied by a condition that defined the contours of the benefit being offered, and that was voluntarily accepted by participants.

In *Snepp*, the plaintiff was a CIA agent who "voluntarily

signed [an employment] agreement that expressly obligated him to submit any proposed publication for prior review." 444 U.S. at 510. In light of Snepp's voluntary acceptance of the restriction, this Court considered only briefly whether the restriction was reasonable and germane to the CIA's legitimate needs. This Court summarily concluded that it was "entirely appropriate," and a "reasonable means" for protecting the secrecy of sensitive information and for ensuring the "effective operation of our foreign intelligence service." *Id.*

The recruiting rule similarly operates to define and protect the contours of TSSAA's program, and was accepted by Brentwood as an up-front condition of membership. TSSAA and its member schools have made the collective judgment that a restriction on recruiting is a central component of the particular athletic program they wish to offer and compete in. That judgment is entitled to great deference. Just like in *Grove City*, Brentwood is free to avoid the recruiting limitations by simply declining membership. And (as in *Rust*) even as a member of TSSAA, Brentwood remains free to speak about athletics, recruiting, TSSAA, or even the virtues of playing football at Brentwood, in a wide variety of contexts. The Sixth Circuit noted "numerous ways in which Brentwood can get its message about athletics out to prospective students." Pet. App. 11-12. But Brentwood's "speech" inviting students still attending different schools to its football practices is a proper subject of the recruiting rules that Brentwood itself agreed to and is part of its active participation in TSSAA's athletic program, just like a coach's on-the-field challenge to a referee's penalty call. As *Rust* makes clear, Brentwood has no right to alter the basic character of a voluntary government program by participating in that program in a manner inconsistent with its purposes.

The Sixth Circuit lost sight of the fact that this case is about athletic competition, and that second-guessing sports rules can undermine the entire enterprise. The recruiting rule defines the particular competition that TSSAA's

member schools have chosen to foster and participate in. The public schools that make up the great majority of TSSAA's members have no First Amendment right to violate the rules established by the league. (Public school employees also have no individual First Amendment right to perform their jobs in a manner inconsistent with such rules. *See Garcetti v. Ceballos*, 126 S. Ct. 1951, 1960 (2006)). Giving Brentwood a special constitutional right to win the state football championship while violating the rules that define the parameters of competition and victory for everyone else is absurd, and deprives the prize of its meaning. This Court recognized in *NCAA v. Board of Regents*, 468 U.S. 85, 101-02 (1984), that an athletic league "would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition." Other athletic associations may have different values, but Brentwood chose to join this one; and, as with all sport rules, the rule must apply to everyone.

The Sixth Circuit also misunderstood the importance of waiver principles in this context. It is true that Brentwood's membership contract with TSSAA does not contain a specific promise not to file First Amendment litigation, but neither did Snepp's employment contract. Brentwood's contract, like Snepp's, does contain a specific promise not to speak in particular ways. This Court has consistently held that almost all constitutional rights are waivable. *E.g., United States v. Mezzanatto*, 513 U.S. 196, 200 (1995). In the criminal context, defendants voluntarily accept limitations on their fundamental constitutional rights all the time. In exchange for a lenient sentence or favorable treatment, a defendant may waive the right to a jury trial and the right against self-incrimination. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969). So long as a waiver is knowing and voluntary, *id.*, the party cannot thereafter complain that the deal was unfair. *Brady v. United States*, 397 U.S. 742, 756-58 (1970). Brentwood's express written agreement to abide by TSSAA's published rules satisfies the "knowing and voluntary" standard, and it has therefore

given up any substantive rights that could support a First Amendment challenge. Whether it also waived the right to file the lawsuit is immaterial.

Like the employee in *Snepp*, Brentwood cannot plausibly claim that it "executed this agreement under duress." 444 U.S. at 510. There is no suggestion here of coercion, and there is no genuine dispute that Brentwood is a voluntary participant in TSSAA, as its own current and former headmasters conceded at trial. *Supra*, at 5. Brentwood's voluntary participation is the epitome of the "reasonable choice" envisioned by *Grove City*. Brentwood may believe that membership in TSSAA is essential in order to achieve its own particular vision of athletic grandeur. But this Court considered and rejected precisely that argument in *NCAA v. Tarkanian*, 488 U.S. 179, 199 n.19 (1988): "The university's desire to remain a powerhouse among the Nation's college basketball teams is understandable, and nonmembership in the NCAA obviously would thwart that goal. But that UNLV's options were unpalatable does not mean that they were nonexistent."[8] Any claim of compulsion is implausible, and this Court has already held that "no school is forced to join" TSSAA. *Brentwood I*, 531 U.S. at 291. In states across the country, including in Tennessee, independent schools have formed their own athletic leagues. Brentwood can as well, if other schools want to participate in its particular vision of high school athletic competition. (If they do not, Brentwood has no right to impose its own preferred values on others.)

This case involves an express, up-front agreement by Brentwood to exercise its constitutional rights in one narrow context only in a particular way, in exchange for a

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[8] *See also Grabow v. Mont. High Sch. Ass'n*, 312 Mont. 92, 98-99 (2002) ("While the consequences may weigh on a district's decision to withdraw from the MHSA, the district still remains free to do so."); *Robinson v. Kan. State High Sch. Activities Ass'n*, 260 Kan. 136, 149 (1996) ("The fact that all member schools must agree to obey the rules governing interscholastic competition, whether or not they individually agree with those rules, likewise does not establish involuntariness.").

discretionary government benefit. The only relevant questions are thus whether the restriction itself presents a "reasonable choice," and whether Brentwood's decision to accept it was voluntary and uncoerced. Under those standards, Brentwood's claim should be dismissed without any need for burdensome and disruptive further litigation over its particular factual justifications for breaking the rule. This Court did not require any such further inquiry in *Snepp*, *Grove City*, *Rust*, or *American Library Association*, and should not here. That approach is particularly fitting in the context of athletic rules. If each application of game rules requires courts to inquire into the circumstances, there will be a steady stream of time-consuming litigation, with core First Amendment values nowhere in the vicinity.

B. Brentwood's Claim Also Fails Under the *Pickering* Test

In the employment and independent contractor cases such as *Pickering*, *Connick*, *Umbehr*, and *Garcetti*, this Court has recognized that it is reasonable, and indeed essential, to ask government employees or contractors to submit to the same general managerial authority enjoyed by private employers, including sometimes sanctions for speech. This Court has held, in effect, that contractual sanctions not implicating speech delivered "as a citizen, on a matter of public concern" are categorically reasonable.

While the *Pickering* test arose in the context of government employment, it can readily accommodate this case as well. Brentwood is a party to a voluntary contractual relationship with TSSAA, and it was punished with contractual penalties for speech delivered within the confines of the contract. Even if this particular contractual relationship raises certain issues that differ from other government contracts, those differences would not warrant greater scrutiny. Brentwood's speech undermines the very nature of the program it chose to join, and that program is both particularly far from the core of First Amendment concerns and particularly likely to arouse intense passions and litigation. This Court also confirmed in *Umbehr* that

the *Pickering* test is flexible enough to accommodate a broad spectrum of voluntary contractual relationships with the government. 518 U.S. at 680. This Court recognized, for example, that there were differences between employees and independent contractors, but held that any differences "can be accommodated by applying our existing framework." *Id.* at 677. This Court noted that it had "consistently eschewed" formal distinctions such as the type of contract or the label applied to a particular contractual relationship. *Id.* at 679. This case, as with other contracting cases, merely requires an appropriate balance between the participant's interests in unfettered speech and "the government's interest in the effective and efficient fulfillment of its responsibilities to the public." *Connick*, 461 U.S. at 150; *see also id.* at 152 ("a wide degree of deference to the employer's judgment is appropriate").

To succeed under the *Pickering* test, a plaintiff must first demonstrate that he is speaking "as a citizen on a matter of public concern." *Garcetti*, 126 S. Ct. at 1958. If the answer is yes, "[t]he question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." *Id.* That two-step analysis simply implements this Court's belief that, unless the speech in question is "as a citizen on a matter of public concern," it is *always* a "reasonable choice" to ask employees or contractors to submit to ordinary workplace supervision. That judgment reflects "the common-sense realization that government offices could not function if every employment decision became a constitutional matter," *Connick*, 461 U.S. at 143, and that "review of every personnel decision made by a public employer could, in the long run, hamper the performance of public functions." *Rankin v. McPherson*, 483 U.S. 378, 384 (1987). This Court has recognized the potential for enormous litigation arising from workplace actions alleged to be retaliation for speech, and has sensibly confined such suits to circumstances that actually threaten core First Amendment values.

That same categorical analysis is appropriate here so that federal courts are not repeatedly drawn into the internal operations of voluntary athletic associations, over disputes far from the heartland of First Amendment concerns. The government as employer or contractor has a legitimate "interest in being free from intensive judicial supervision of its daily management functions." *Umbehr*, 518 U.S. at 678. Those same interests are implicated when the government operates a voluntary athletic association, which by its very nature must enforce game rules that may be arbitrary by external standards and will tend to be enforced in particularly impassioned circumstances.[9] There is no reason for Article III courts to be drawn into the internal workings of a voluntary athletic organization unless core First Amendment values are truly at stake.

Brentwood was not speaking "as a citizen, on a matter of public concern." First, Brentwood was not speaking "as a citizen," but rather as a participant in TSSAA-sponsored athletic competition. It is undisputed that, just as in *Rust*, Brentwood is free to say whatever it likes as a citizen. The Sixth Circuit noted that there were "numerous ways in which Brentwood can get its message about athletics out to prospective students," and explicitly found that "Brentwood has multiple ways of communicating with middle school students to provide them with information about the academic, athletic, and spiritual aspects of the educational experience at Brentwood." Pet. App. 11-12. The recruiting

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[9] For that reason, courts have repeatedly held that the judiciary has an exceedingly limited role to play in policing the internal operations of voluntary athletic associations. *See, e.g., Ind. High Sch. Athletic Ass'n. v. Reyes*, 694 N.E.2d 249, 256 (Ind. 1997) ("A voluntary association may, without direction or interference by the courts, for its government, adopt a constitution, by-laws, rules and regulations which will control as to all questions of discipline, or internal policy and management, and its right to interpret and administer the same is as sacred as the right to make them." (citation omitted)); *Fla. High Sch. Athletic Ass'n v. Marazzito*, 891 So. 2d 653, 654 (Fla. App. 2005) ("Florida courts may intervene in the internal affairs of an association such as the FHS[A]A only under exceptional circumstances.").

rule *only* implicates Brentwood's recruiting speech within the contours of its voluntary participation in TSSAA's competitive athletic program, as defined by the agreement that Brentwood signed. Just as a public employee does not speak "as a citizen" when speaking in the context of his job duties, *see Garcetti*, 126 S. Ct. at 1960, and a chess player does not speak "as citizen" when seeking prohibited outside advice in the middle of a match, Brentwood does not speak "as a citizen" when inducing particular eighth graders to attend football practice at its school, when it specifically agreed that such speech would be an aspect of athletic competition subject to game rules.

Second, the speech in question was not on any subject of public concern.[10] In this context, "public concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication." *City of San Diego v. Roe*, 543 U.S. 77, 83-84 (2004). Inducing eighth graders to leave their school and attend spring football practice at a different school is not speech of general interest or concern to the public.[11] Brentwood's overall recruiting efforts at most are commercial speech, since they aim to solicit new enrollment and secure a commercial transaction. The more targeted recruiting speech at issue in this case has an even more private interest—to win football games. This Court in

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[10] The Sixth Circuit held that since TSSAA would be required to demonstrate a substantial government interest in order to survive "time, place, and manner" review, "these substantial interests will by definition implicate a 'matter of public concern.'" Pet. App. 9 (quoting *Pickering*, 391 U.S. at 573). Perhaps the Sixth Circuit misread *Pickering* as suggesting that the *government's restriction* must implicate a matter of public concern, rather than that the *citizen's speech* must implicate a matter of public concern. Its approach would turn *Pickering* on its head, and would read the "public concern" requirement out of the law. The fact that the government has substantial interests in regulating speech does not mean that that speech is necessarily on a matter of public concern.

[11] To the extent Brentwood asserts a more generalized recruiting interest in informing the public of its curricular and extra-curricular offerings, such speech of course is not implicated by TSSAA's rule.

Connick held that an employee's letter to co-workers "pertaining to the confidence and trust that [her] co-workers possess in various supervisors, the level of office morale, and the need for a grievance committee" consisted of internal issues that did not touch a matter of public concern. 461 U.S. at 148. Coach Flatt's letter about the football practice schedule is a step removed even from *Connick*. It is certainly of no interest to anyone other than the students and their parents. *See* Br. of Nat. Sch. Bds. Ass'n ("NSBA"), at 13-15.

The Sixth Circuit believed the *Pickering* standard did not apply because "the applicability of the First Amendment to the TSSAA's regulatory conduct does not hinge on whether there was a contract or not." Pet. App. 93. The Sixth Circuit simply confused different meanings of the word "regulatory." A public employer may "regulate" its workplace, and the agency in *Rust* "regulated" the speech of voluntary participants within the confines of its program, yet this Court has held that such "regulation" justifies an entirely different First Amendment analysis than, for example, a city's "regulation" of a public park. *See Waters v. Churchill*, 511 U.S. 661, 671 (1994) (explaining why "the government's role as employer ... gives it a freer hand in regulating the speech of its employees than it has in regulating the speech of the public at large"). This Court reasoned in *Brentwood I* that, in a sense, TSSAA has been left to "regulate" public school athletic competition in lieu of state regulation that would otherwise have been conducted by the Board of Education. 531 U.S. at 301. But that analysis could establish, at most, that TSSAA and the public school officials "entwined" with it are exercising some form of sovereign "regulatory" authority over *the public schools*. TSSAA could not be "regulating" the athletic competition of *private schools* in that same sense, because the Board of Education itself has no supervisory authority over the rules for private school competition. The Sixth Circuit's central error ultimately was its failure to recognize that TSSAA has no "regulatory" power over Brentwood other than

Brentwood's own contractual promises. And whether the authority exercised is sovereign power or merely contractual rights matters to the First Amendment analysis. This Court held that the speech restriction in *Umbehr* would have triggered strict scrutiny if imposed on the public under the state's sovereign power, but was entitled to deference when imposed pursuant to "contractual power." 518 U.S. at 678.

C. Any Balancing Test Favors TSSAA

Even if the *Rust* principle and the categorical "as a citizen on a matter of public concern" limitation were ignored, TSSAA's interests in administering its athletic program and enforcing its recruiting rule outweighs Brentwood's interest in violating that rule, and therefore still present a "reasonable choice."

The *amicus* briefs testify to the serious harms of athletic recruiting at this age, and to the importance of competitive equity. The collective judgment of TSSAA's member schools is that an anti-recruiting rule is essential to preventing exploitation of impressionable young students, ensuring the primacy of academics, and preserving a balanced playing field. This Court has "'consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large.'" *Umbehr*, 518 U.S. at 676 (quoting *Waters*, 511 U.S. at 673). Such deference is especially appropriate here in light of the educational setting. Resolving conflicts in the context of school activities "is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges." *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (citations omitted). There is no First Amendment right to speech that "would undermine the school's basic educational mission," *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986), and there is no reason that principle should apply with less force to the mission of a group of schools rather than an individual school. *See* Br. of NSBA at 17-19.

Brentwood's violations were unambiguous and clearly harmed the interests the recruiting rule is designed to serve. The practice invitation alone caused 12 middle school students who were not attending or enrolled at Brentwood to attend Brentwood's spring football practice—leaving their own school's extracurricular activities, and perhaps giving Brentwood an opportunity to evaluate their skills before making final decisions on financial aid packages. *Supra*, at 9 n.2. The Sixth Circuit gave far too little weight to the damage athletic recruiting does to the values of impressionable young people, *see* Br. of NFHS, at 7-9, and it improperly gave no weight at all to competitive equity. As noted, there also is great value in an athletic context to enforcing rules simply because they are rules. And the sanction imposed was far from unreasonable. Outside of a modest fine that Brentwood has never paid, it was simply a temporary exclusion from post-season tournament play.

II. TSSAA'S DECISIONS WOULD ALSO SATISFY TIME, PLACE, AND MANNER STANDARDS

The Sixth Circuit should never have applied time, place, and manner analysis. Nonetheless, TSSAA should have prevailed even under those standards, for two reasons. First, the Sixth Circuit relied on its own policy judgment that competitive fairness is not a substantial interest of a state-wide athletic association. That conclusion is directly contrary to the record evidence and common sense. Second, the Sixth Circuit held that enforcement of the recruiting rule *in this instance* did not further the interests it did think were substantial: protecting students and ensuring that athletics remain subordinate to academics. But this Court has always asked whether the *rule* is justified by substantial interests. TSSAA is entitled to enforce a constitutionally justified rule without litigation over whether the particular violation should have been considered harmless.

A. Competitive Equity is a Substantial State Interest

The Sixth Circuit held that TSSAA failed to prove that

it has any substantial interest in fostering a level playing field among its member schools, writing that TSSAA "can cite to no evidence to support the notion that ensuring that high schools compete in interscholastic sports in an equitable manner is a substantial state interest." Pet. App. 100. That ruling is unprecedented and wrong.

"[T]he very existence of a game to play, let alone a championship race to savor, requires that the participants cooperate off the field to create a fair and balanced match-up on the field." Paul C. Weiler, *Leveling the Playing Field* 2 (2000). As anyone who has ever participated in athletics can confirm, competitive fairness is essential because a perception of futility undermines the entire enterprise. Children on the playground alternate picking players for teams. Every major professional sport league has a draft and restrictions on free agency, and many have salary caps or revenue sharing. All of these rules have as their primary purpose a desire to create and maintain competitive balance. *See, e.g., Wood v. Nat'l Basketball Ass'n*, 809 F.2d 954, 961 (2d Cir. 1987) (purpose of NBA salary cap and draft restrictions is "spreading talent among the various teams"); *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1175 (D.C. Cir. 1978) ("The NFL draft, like similar procedures in other professional sports, is designed to promote 'competitive balance.'").

Competitive equity is especially important to the goals of high school athletics. TSSAA's constitution recognizes that "the primary objective of all secondary schools is to educate youth," and that "the athletic field and the gymnasium are classrooms in which teaching is foremost in the development of character, integrity, sportsmanship, and teamwork." JA 134. All those goals are undermined if student athletes perceive that the deck is unfairly stacked against them or that competition is futile, and become dispirited or cease participation. And, as *amicus* NSBA explains (at 19-21), reasonably balanced teams are also important to protect students' physical safety, particularly in contact sports like football.

For these reasons, courts have repeatedly recognized (without requiring any special evidence) that competitive equity is vital to interscholastic sports. The Eighth Circuit in *Pottgen v. Missouri State High School Activities Ass'n*, 40 F.3d 926, 929 (8th Cir. 1994), held that a rule enforcing an age limit "helps reduce competitive advantage flowing to teams using older athletes," which was "of immense importance in any interscholastic sports program." The Third Circuit in *Smith v. NCAA*, 139 F.3d 180, 185, 187 (3d Cir. 1998), recognized that the NCAA's eligibility rules "primarily seek to ensure fair competition ... and allow for an even playing field." The Seventh Circuit upheld the NCAA's no-agent rules because they "preserve the honesty and integrity of intercollegiate athletics and foster fair competition among the participating amateur college students." *Banks v. NCAA*, 977 F.2d 1081, 1090 (7th Cir. 1992). None of these courts scoured the record for evidence that competitive equity is important. They accepted it as self-evidently important.[12] *See also* Br. of NCAA, at 20-22.

Judge Rogers's dissent had it exactly right: "the City of Renton need not provide evidence for the obvious proposition that crime increases are against the public interest, and New York in the *Ward* case need not provide evidence that appropriate modulation of band concerts is in the public interest. Similarly, it can hardly be argued that

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[12] *See also Chabert v. La. High Sch. Athletic Ass'n*, 312 So. 2d 343, 346 (La. Ct. App. 1975) (finding that "illegal recruiting of promising young athletes is the gravamen of this recurring problem," and that "[i]t is unarguable that any state has an interest in prohibiting such occurrences in its high schools"); *Cardinal Mooney High Sch. v. Mich. High Sch. Athletic Ass'n*, 467 N.W.2d 21, 22 (Mich. 1991) (upholding eligibility rule because it was "designed to rectify the competitive inequities that would inevitably occur if schools were permitted without penalty to field ineligible athletes"); *Law v. NCAA*, 134 F.3d 1010, 1023-24 (10th Cir. 1998) ("We note that the NCAA must be able to ensure some competitive equity between member institutions in order to produce a marketable product...."); *Washington v. Ind. High Sch. Athletic Ass'n*, 181 F.3d 840, 844 (7th Cir. 1999) (recognizing "the public's interest in maintaining a level field of competition").

TSSAA needed more evidence for the obvious proposition that more evenly balanced high school football matches are in the public interest." Pet. App. 144-45 n.2.

Regardless, the Sixth Circuit's holding that TSSAA "can cite to no evidence to support the notion that ensuring that high schools compete in interscholastic sports in an equitable manner is a substantial state interest," Pet. App. 100, simply ignores the record in this case. There are many pages of testimony speaking precisely to the point that both the perception and reality of competitive equity are essential to interscholastic athletics. CAJA 606-07, 903-05, 1163-65, 1311-12, 1350-51, 1564-65, 1571-74, 1579, 1636-38, 1657, 1668-70, 1728-32. One witness testified that "without a competitive equity ... there becomes a resentment on the part of the teams that feel that they are having to compete all of the time against better caliber teams." *Id.* at 1669. Another testified that students will not learn "that sport builds character or sport is about fair play if the play in general is not fair." *Id.* at 1730. Yet another testified that "if you do not have a level playing field, the competition cannot be fair, you can only have hard feelings result. ... When that happens, schools lose a tremendous vehicle, sports, for reaching and motivating young people...." *Id.* at 1571-72.

Although the Sixth Circuit questioned whether competitive equity is a substantial government interest, it did *not* question the record evidence demonstrating that the recruiting rule is tailored to achieve that interest.[13] Reversal of this error accordingly requires reversal of the judgment.

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[13] The court of appeals noted that "experts and Brentwood's own Headmaster Brown testified that the recruiting prohibition helps level the playing field among schools, especially as between private schools with significant resources and public schools with more limited resources and access to potential students." Pet. App. 99-100. Indeed, the Sixth Circuit's concern was that while there was ample testimony "about *how* the recruiting rule preserves competitive equity among schools," it found insufficient evidence "explaining *why* competitive equity is an important value in the first place." *Id.* at 100.

B. TSSAA Is Entitled to Enforce its Athletic Rules Without Scrutiny of Each Individual Application

Even if this Court were to find that the rule was not adequately supported by TSSAA's interest in competitive equity, reversal is still required. The Sixth Circuit also erred by focusing on the narrow facts of this case to conclude that this particular violation of the recruiting rule should have been overlooked or excused. The court found the recruiting rule generally supported by TSSAA's substantial interests in protecting students and keeping athletics secondary to academics, but nevertheless held that "there was no evidence to show that the punishment of Brentwood was justified due to the effect of Brentwood's actions on the children or the relative standing of academics and athletics at the school." Pet. App. 106.

That answers entirely the wrong question. This Court has always asked whether the *rule* is justified by substantial state interests—not whether a particular plaintiff's violation was somehow harmless. This Court held in *Clark v. Community for Creative Non-Violence* that the validity of a time, place, and manner regulation "need not be judged solely by reference to the demonstration at hand," and the government's interest in generally applying a regulation cannot be challenged by advocating for an exception. 468 U.S. 288, 296-97 (1984). And in *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), this Court rejected the argument that Ohio must prove that enforcement furthered the purposes of the rule, holding that "the absence of explicit proof or findings of harm or injury is immaterial." *Id.* at 468. Similarly, in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), and again in *FAIR*, this Court rejected "least restrictive means" analysis and held that a time, place, and manner regulation is not unconstitutional merely because it is overbroad by comparison to the interests it is designed to serve. The essence of Brentwood's position is that a somewhat narrower rule—one that would not reach its precise conduct here—would be less restrictive and would

still achieve TSSAA's legitimate purposes. That is precisely the argument this Court rejected in *Ward* and *FAIR*.

Since the Sixth Circuit agreed that the recruiting rule generally was justified by substantial interests, it should have held that TSSAA is entitled to enforce that rule without regard to whether this violation actually threatened the reasons for the rule. Particularly in the athletic context, referees and administrators must be able to enforce rules just because they are rules. If a referee ejects a player for speech violating a rule against "unsportsmanlike behavior," the Sixth Circuit would direct federal courts to review the phrase "unsportsmanlike behavior" for vagueness, examine the circumstances of the player's speech to see if it was "unsportsmanlike," evaluate the interests behind the rule, and determine if ejection actually promoted those interests. No athletic association could function if it bore the burden of justifying the application of its game rules in each instance of enforcement. In any event, the district court and Sixth Circuit erred by concluding that enforcement was unnecessary in this instance. *See supra*, at 33.

III. BRENTWOOD'S DUE PROCESS RIGHTS WERE NOT VIOLATED

The Sixth Circuit held that Brentwood's procedural due process rights were violated because conversations between the TSSAA Board of Control and TSSAA staff investigators somehow constituted improper consideration of "*ex parte* evidence." Pet. App. 113-20. Once again, the Sixth Circuit's analysis effectively imports due process standards designed for serious applications of sovereign power into a contractual context.

The Sixth Circuit relied on a finding by the district court that TSSAA officials Gene Menees and Bernard Childress, who participated in investigating the allegations against Brentwood, "were present during the Board of Control's private deliberations following the August 23 hearing" and "provided some information to the Board regarding their findings during the private session." Pet. App. 115-16. The

Sixth Circuit then accepted Brentwood's argument that it "should have had the chance to rebut" this "*ex parte* evidence" by "cross-examining the TSSAA investigators." *Id.* at 113. Relying on this Court's decision in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), it held that due process requires "notice of the evidence relied upon on penalizing Brentwood and an opportunity to respond to that evidence before the penalties were imposed." *Id.* at 119. The Sixth Circuit concluded that Brentwood did not receive such notice because it supposedly "had no notice that it should respond to the King evidence at the hearings" and "[y]et, the King evidence was used by the TSSAA in its deliberations and, under the district court's findings, influenced the penalties imposed on Brentwood." *Id.*

The Sixth Circuit's analysis muddles together several distinct issues. First, as a matter of law the court confused notice of *the issues* with notice of the specific *evidence*. TSSAA's constitution requires only that "[a]ny school charged with violating TSSAA regulations shall be notified *of such charges*" and must be given "the opportunity to present its case at a hearing" before the Board of Control. JA 141 (emphasis added). This hearing was an opportunity for Brentwood to tell its side of the story. In this context, there is nothing wrong with "*ex parte*" conversations between the Board members and TSSAA officials who participated in the investigation. Indeed, Carter participated in the investigation and the Sixth Circuit rejected the argument that there was anything improper about his participation in deliberations. Pet. App. 113. The other Board members were entitled to talk to Carter or to the investigators prior to the hearing, and may have learned various things. Such conversations do not become improper merely because they occurred after the hearing. And fair notice to Brentwood of the "the charges" against it does not require TSSAA to proffer a detailed synopsis of all such conversations. It requires notice of the *allegations*, at a level of generality specific enough to allow Brentwood to tell

its side of the story. The Sixth Circuit's reasoning effectively gives Brentwood a right to a hearing before decisionmakers who know nothing other than whatever "evidence" is elicited in the hearing and subject to cross-examination by Brentwood. Even the Sixth Circuit recognized, when discussing Carter's participation, that Brentwood is entitled to no such thing.

Brentwood got precisely the notice and process that it agreed to, and that should end the matter. Nothing in the Constitution prohibits parties from contracting for the process that will govern contractual disputes. As this Court explained in *Waters*, even "[t]he government may certainly choose to adopt other [procedural] practices, by law *or by contract*." 511 U.S. at 676 (emphasis added). Accordingly, this Court has rejected due process challenges when parties to a contract agree that arbitration will govern their disputes. *See, e.g., Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *see also D.H. Overmyer, Co. v. Frick Co.*, 405 U.S. 174, 185-86 (1972) ("due process rights ... are subject to waiver" by contract); *Nat'l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315-16 (1964) (same). It is undisputed that Brentwood voluntarily entered into the contract and was well aware of the procedures provided. And where a plaintiff's property interest under a contract with the government "can be fully protected by an ordinary breach-of-contract suit," then so long as the state "makes ordinary judicial process available to [the plaintiff] for resolving its contractual dispute, that process is due process." *Lujan v. G & G Fire Sprinklers, Inc.*, 532 U.S. 189, 197 (2001); *see also Waters*, 511 U.S. at 679 ("an employee may be able to challenge the substantive accuracy of the employer's factual conclusions under state contract law"). Brentwood is free to pursue a state law breach action if it believes it did not get the notice it was entitled to. There is no reason to waste the time of the federal courts and demean the federal civil rights laws (including, most importantly here, the fee shifting provisions of § 1983) with what is at bottom a simple contract dispute.

Regardless, TSSAA's procedures, and the notice that Brentwood received, provided far more process than was constitutionally required under the circumstances. *See Mathews v. Eldridge*, 424 U.S. 319 (1976); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands."). In light of TSSAA's "institutional needs and objectives," *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974), all that due process requires in this context is "some opportunity for [Brentwood] to present [its] side of the story" which is of "value [to TSSAA] in reaching an accurate decision." *Loudermill*, 470 U.S. at 543; *Waters*, 511 U.S. at 676-77 ("Government employers should be allowed to use personnel procedures that differ from the evidentiary rules used by courts, without fear that these differences will lead to liability."). Under due process principles, Brentwood would be entitled to a summary of the allegations against it at a level of generality sufficient to give it "a meaningful opportunity to present [its] case." *Mathews*, 424 U.S. at 349. It is not entitled to a detailed summary of every conversation or bit of information that might reach the decisionmakers. Regardless, Brentwood has never even identified any "evidence" discussed during deliberations of which it did not have notice. There is nothing related to Bart King in Gene Menees's investigative notes that was not communicated to Brentwood in Carter's July 3, 1997 letter. JA 204-11. As Judge Rogers explained, "it is unclear what evidence [TSSAA investigators] could have presented given that they did not interview Mr. King and the investigation consisted of a series of letters between Brentwood's headmaster and TSSAA." Pet. App. 148.

Brentwood's argument has always been that, under *Goldberg*, "TSSAA should have been required to present its case and make its investigators (Childress and Menees) available for cross-examination," and its decision could only be based on "evidence adduced at the hearing." Brief of Brentwood Academy, Sixth Circuit Nos. 03-5245/5278 (June 8, 2004), at 61 (quoting *Goldberg*). Although it invoked

Loudermill, the Sixth Circuit effectively gave Brentwood a right to the *Goldberg* procedures. Those standards are completely inappropriate in this contractual setting. This Court has emphasized that *Goldberg* is the *only* case in which it has ever required a hearing of that nature, and that the welfare hearings in *Goldberg*—involving a denial of "the very means by which to live," 397 U.S. at 264—"presented significantly different considerations than are present in the context of public employment." *Loudermill*, 470 U.S. at 545. If the *Goldberg* procedures are unnecessary when a tenured public employee is fired, surely they are not required here. There is no constitutional requirement that TSSAA present its own case at all, let alone every piece of information or evidence it may have gathered. *Id.* (a hearing "though necessary, need not be elaborate"). And there certainly was no requirement that the Board's decision must be based solely on the "evidence" elicited by Brentwood at that hearing. Brentwood has identified nothing that would justify this Court "depart[ing] from the ordinary principle ... that something less than an evidentiary hearing is sufficient prior to adverse administrative action." *Mathews*, 424 U.S. at 343.

Under a proper understanding of the law, the following undisputed facts establish that Brentwood had ample notice of the allegations related to Bart King and a full opportunity to tell its side of the story.

As early as May 29, 1997, Ronnie Carter asked Coach Flatt about his connection with Bart King and King's possible involvement in recruiting Jacques Curry and other students. Flatt then faxed a letter to Carter responding to the concerns. JA 120-23. On May 30, Carter sent Headmaster Brown a letter with a list of questions, including a question about King's relationship with the school and various students. JA 124-27. Brown and Robert Butler responded with a letter received by TSSAA on June 13. JA 128-33. After additional investigation, Carter sent Brown "preliminary information obtained as a result of questions concerning potential violations of TSSAA rules by

Brentwood Academy." JA 204-11. Much of the letter describes King's alleged recruiting activities directed at students and coaches at Neely's Bend Middle School, East Middle School, and others.[14] This letter stated that "[s]ince the information from Brentwood Academy to us indicates that Mr. Butler and Mr. Flatt have had contact with Mr. King, we are asking Brentwood Academy to respond to any parts of information involving these individuals." JA 210. Brentwood responded in writing on July 15. JA 212-29.

Following this exchange of letters and meetings, Carter determined that TSSAA rules had been violated and sent Brown a letter on July 29, 1997 imposing penalties. JA 238-44. One of the issues addressed was King's alleged recruiting of Jacques Curry at East Middle School. For this violation, TSSAA declared Curry ineligible for athletics at Brentwood. TSSAA also imposed a $3,000 fine due to Brentwood's violations of the recruiting rule. JA 243.

Brentwood took advantage of the process guaranteed by its membership contract by requesting an intermediate appeal before Carter and three members of the Board of Control. Carter explained at the August 13, 1997 hearing that its purpose was to give Brentwood an opportunity to explain its side of the story and supplement the information that had already been provided during the investigative process. JA 245-46. Brentwood was represented by counsel at the hearing, and to prepare it interviewed and collected sworn statements from individuals involved with the

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[14] These allegations, which were described in Carter's July 3, 1997 letter to Brentwood, included statements to two TSSAA investigators, Gene Menees and Bernard Childress, from student-athletes that if the student attended Brentwood Academy, "he would *probably* have a car" by the time he was in tenth grade. TSSAA informed Brentwood that a student at East Middle School said "Mr. King has bought his relative clothes, shoes, and jewelry and has told him that all he wants him to do is attend Brentwood Academy." Mr. King also allegedly drove students to the entrance exams at Brentwood, took another to work, and bought another a bracelet. A coach at Goodlettsville Middle School told TSSAA that King was recruiting his best athletes by promising scholarships and free transportation. JA 208-09.

allegations. These statements were submitted at the hearing, and included a five-page affidavit from King. JA 252-53. Brentwood was permitted to video-tape the hearing and a court-reporter transcribed the proceedings. In addition to live testimony, Brentwood introduced King's affidavit, and a statement from Curry. JA 253. In total, Brentwood submitted twenty-eight exhibits, including additional sworn statements, notes, and affidavits. JA 252-53. Brentwood presented evidence for four-and-a-half hours and TSSAA's deliberations lasted three hours. JA 254.

After the hearing, TSSAA modified the penalties, but Curry remained ineligible due to King's contacts. JA 254-58. Brentwood again took advantage of the contractually-guaranteed procedures and appealed to the full Board of Control. The hearing took place nine days later. Brentwood was again represented by counsel and presented the live testimony of three witnesses (including Curry), and introduced thirty-one exhibits (including King's affidavit). JA 259-62. Brentwood also played an edited version of the August 13th hearing to capture the "high points" of its prior presentation. JA 264. Brentwood presented its side of the story for two and one-half hours.

The final witness Brentwood presented was Jacques Curry. JA 264-67. Curry—who did not receive one of Coach Flatt's letters or free tickets to the game—was only relevant to the case due to his relationship with King, and one of the penalties that Brentwood was appealing to the Board of Control was the decision making Curry ineligible for athletics at Brentwood. Curry's testimony focused on his relationship with King and his decision to attend Brentwood. Brentwood's attorney said to Curry: "Now, there's been some discussion in the newspaper and otherwise about a gentleman by the name of Bart King. Would you please tell this board of control about your relationship with Bart King." JA 265. Curry was asked if King had promised a car to him, and numerous other questions about his decision to attend Brentwood and King's possible involvement. JA 265-66; *see also* CAJA 3159-73.

Immediately following Curry's testimony about King, Nebel stated: "Any other questions? That's going to be it for our proof. If I could make just a few concluding remarks. By the way, we have Bart King here to answer any questions. And it was our intention to put him on, but I don't know if you all are interested in extending for five minutes to hear from Bart King or not. He's here if you want him." JA 267. Carter responded "No." Nebel then gave Brentwood's closing statement and the Board of Control began deliberating.

The Sixth Circuit's assertion that "evidently" that brief exchange "was the only discussion of King at the hearing," Pet. App. 115, is simply inexplicable. The purpose of Curry's testimony—immediately preceding that exchange—was to address Curry's decision to attend Brentwood and King's alleged role in that process. At trial, Brentwood's Headmaster Brown testified that, prior to the hearings, he knew and understood the charges against Brentwood, JA 452-53, as did Coach Flatt, JA 301. Flatt testified that the letters sent by TSSAA to Brentwood made clear that "supposedly this Mr. King had promised them cars and given them diamonds and everything. I mean [Carter] put those down as allegations."[15] JA 303. Tom Nebel, the attorney representing Brentwood in its hearings, was asked if he knew before attending the hearing "that the activities of Bart King were a concern to TSSAA?" Nebel responded: "Yes. I knew that TSSAA was concerned about Mr. Bart King." JA 401-02. Nebel stated that he knew enough about the allegations to prepare the extensive exhibits and to get sworn statements from Curry and other students. JA 401-03. Nebel also testified that he was not prevented from presenting any information that he wanted at the hearings.

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[15] Although Carter's July 29 letter did not mention King by name, it declared Curry ineligible solely due to his recruitment by King, as cited in prior letters. JA 238-44. Brentwood then obtained and submitted King's affidavit and Curry's statement in order to respond to the King allegations at the hearing, and Carter's August 14 letter continued to declare Curry ineligible. JA 254-58.

JA 396-401. Brentwood was aware of the King allegations throughout the process.

Brentwood received all the notice and process it was entitled to under the contract and the Constitution.

IV. *BRENTWOOD I* SHOULD BE RECONSIDERED

The Court acknowledged in *Brentwood I* that TSSAA's enforcement of its recruiting rule did not precisely fit any of the traditional state action doctrinal categories, but nonetheless concluded that TSSAA was a state actor based on its "entwinement" with state officials. That entwinement analysis is difficult to square with prior precedent and has confused lower courts and demonstrated its unworkability. It may even have contributed to the Sixth Circuit's misunderstanding of substantive First Amendment law, by losing sight of the traditional focus on the *specific conduct complained of* in favor of an undue emphasis on the overall relationship between the actor and the State. TSSAA respectfully believes that this Court should reconsider.

This Court's state action precedent has always focused on "the specific conduct of which the plaintiff complains." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). "[C]areful attention," therefore, must be paid "to the gravamen of the plaintiff's complaint" to "assure that constitutional standards are invoked only when ... the State is *responsible* for the specific conduct of which the plaintiff complains." *Id.* at 1003-04. *Brentwood I*, however, looked principally to the "structure of the association," and asked whether the state "can sensibly be seen" as "entwined" in that structure. 531 U.S. at 299. That entwinement inquiry provides no full answer to the traditional ultimate question: whether TSSAA's enforcement of the recruiting rule against Brentwood "can fairly be attributed to the State," *Blum*, 457 U.S. at 1004, because the state "provided a mantle of authority that enhanced the power of [TSSAA]," *Tarkanian*, 488 U.S. at 192; *cf. Blum*, 457 U.S. at 1013 (Brennan, J., dissenting) (question is whether the defendant brought "the force of the State to bear" against the

plaintiff). Of course everything that the state itself does is state action. But for private actors with some connection to the state that raises concerns, this Court has always examined the particular conduct or functions challenged. *See* Br. of NCAA, at 10-12.

Regardless of TSSAA's structure or the composition of its Board, the specific conduct complained of here—its enforcement of the recruiting rule against Brentwood—is not fairly attributable to the state under *Blum* and this Court's other prior state action precedents. Even if the state authorized TSSAA to "regulate" athletic competition among its own public schools in some sense,[16] and even if public school officials are "entwined" with TSSAA, TSSAA does not exercise any form of state authority over *private* schools like Brentwood. The state Board of Education has no supervisory power over private school athletics that would permit it to impose rules of athletic competition on them. TSSAA's authority to enforce its rules *against Brentwood* thus does not derive from any state power, but solely from its contractual relationship with the school. 531 U.S. at 308 (Thomas, J., dissenting); *see also Grabow*, 312 Mont. at 99 ("enforcement of [athletic association] rules is a unique power derived through mutual agreement").

The state itself also had no direct involvement in TSSAA's enforcement of the recruiting rule here. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999) ("Action taken by private entities with the mere approval or

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[16] On August 25, 1972, 47 years after TSSAA was formed, the State Board of Education adopted a resolution recognizing and designating TSSAA as the organization to supervise the interscholastic athletic activities of Tennessee's *public* secondary schools. While the State Board did on a few occasions thereafter take action to approve TSSAA's rules, the action was "ceremonial" since the Board had no authority to control TSSAA's operations. *E.g.*, JA 92, 110. To reflect the reality that it could not control TSSAA, the Board eventually changed its resolution simply to recognize TSSAA's role in coordinating interscholastic athletic competition, and to authorize *public* schools "to voluntarily maintain membership" in TSSAA. JA 112. Neither resolution had any impact on TSSAA's operations. And the State has never given TSSAA any power.

acquiescence of the State is not state action."); *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 411 (1995) (O'Connor, J., dissenting) (no state action "unless the Government affirmatively influenced or coerced the private party to undertake the challenged action").[17] In *San Francisco Arts & Athletics v. United States Olympic Committee*, USOC's federal charter granted it exclusive use of the word "Olympic." 483 U.S. 522 (1987). When S.F. Arts promoted the "Gay Olympic Games," USOC sued. This Court held that "USOC's choice of how to enforce its exclusive right to use the word 'Olympic' simply is not a governmental decision. There is no evidence that the Federal Government coerced or encouraged the USOC in the exercise of its right." *Id.* at 547. The same is true here.[18]

The entwinement rationale also undermines the assumption that state action equals action "under color of law." Color of law "requires that the defendant in a § 1983 action have exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *West v. Atkins*, 487 U.S. 42, 49 (1988). As in *Polk County v. Dodson*, however, TSSAA's enforcement of the recruiting rule "entailed functions and obligations in no way dependent on state authority." 454 U.S. 312, 318 (1981). And, "[w]here the

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[17] Even under the *Blum* dissent, enforcement of the recruiting rule would not qualify as state action. 457 U.S. at 1028 (Brennan, J.) ("[W]e may safely assume that when the State chooses to perform its governmental undertakings through private institutions, and with the aid of private parties, not every action of those private parties is state action. But when the State directs, supports, and encourages those private parties *to take specific action*, that is state action.") (emphasis added).

[18] *Brentwood I* cited *Pennsylvania v. Board of Directors of City Trusts*, 353 U.S. 230 (1957), and *Evans v. Newton*, 382 U.S. 296 (1966), but neither case requires a finding of state action here. *City Trusts* involved a public state agency, and *Evans* involved a sham transfer of public land to a private trust that this Court held remained a state actor because "the tradition of municipal control had become firmly established." 382 U.S. at 300.

issue is whether a *private* party is engaged in activity that constitutes state action, it may be relevant that the challenged activity turned on judgments controlled by professional [or other] standards ... not established by the State." *West*, 487 U.S. at 52 n.10.

This Court also misapprehended the nature and extent of the state's entwinement in TSSAA. This Court's conclusion that public school officials must be acting within the scope of their public duties when representing their institutions, 531 U.S. at 299, is also problematic in two respects. First, TSSAA is not merely an instrument furthering the uniform interests of public schools. Rather, it "serves the common need of member institutions for regulation of athletics while correlating their diverse interests." *Arlosoroff v. NCAA*, 746 F.2d 1019, 1022 (4th Cir. 1984). Second, nothing in TSSAA rules require board members to be *public* school administrators. Board members are elected from the nine athletic districts and represent *all* public and private schools in their district. 531 U.S. at 307 (dissent).

Brentwood I also found entwinement because "State Board members are assigned ex officio status to serve as [TSSAA board] members." *Id.* at 300. But TSSAA's constitution and bylaws do not mention this status; it is non-voting, CAJA 1099, and it is held by representatives of the Board of Education *and* eight other representatives from six community organizations. JA 272. No ex officio member attended either of the hearings or deliberations actually at issue here. CAJA 3084.

Brentwood I's excessive focus on the structure of the organization rather than on the nature of the specific action challenged may have contributed to the Sixth Circuit's confusion about substantive First Amendment law. The Sixth Circuit seemed to believe that because this Court described TSSAA as a "regulator" of interscholastic athletics, everything TSSAA does must necessarily be an exercise of sovereign power to be reviewed under the same constitutional standards as a statute limiting speech. (Look

for Brentwood to make the same error in its upcoming brief.) The unhappy consequence was that the Sixth Circuit reviewed a decision by TSSAA to impose penalties under its private contract with Brentwood—a decision that was not even coerced or encouraged by the state—under standards more strict than those that would have applied if the state itself had fired a state employee for the same speech.

Brentwood I has confused lower courts and has been strongly criticized by commentators. Pet. 28-29; *see also* Br. of NCAA at 13-15. When a decision departs from precedent and confuses lower courts, this Court has not hesitated to revisit it. *Payne v. Tennessee*, 501 U.S. 808, 828 (1991); *Agostini v. Felton*, 521 U.S. 203 (1997) (overruling decision at later stage of same litigation).[19] By overruling a recent decision that "itself *departed* from ... prior cases—and did so quite recently," this Court does "not depart from the fabric of law; [it] restore[s] it." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 233-34 (1995) (O'Connor, J.). This Court should reaffirm the doctrine's focus on the specific action complained of. "Remaining true to an 'intrinsically sounder' doctrine established in prior cases better serves the values of *stare decisis* than would following a more recently decided case inconsistent with the decisions that came before it." *Id.* at 231.

CONCLUSION

The judgment of the court of appeals should be reversed, and this Court should direct the entry of judgment in favor of TSSAA on Brentwood's First Amendment and Due Process claims.

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[19] *See also United States v. Dixon*, 509 U.S. 688 (1993) (overruling recent decision that "contradicted an unbroken line of decisions"); *Solorio v. United States*, 483 U.S. 435, 450-51 (1987) (overruling decision with "doubtful foundations" and "novel approach" which must "bow to the lessons of experience and the force of better reasoning"); *Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 47 (1977) (overruling case that "was an abrupt and largely unexplained departure" and was "the subject of continuing controversy and confusion").

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No. 06-427

In The
Supreme Court of the United States

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION,
Petitioner,

v.

BRENTWOOD ACADEMY,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

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QUESTIONS PRESENTED FOR REVIEW

Whether the Sixth Circuit correctly held that TSSAA violated the First Amendment and Due Process rights of Brentwood Academy when it imposed penalties for Brentwood Academy's pure speech communications with incoming students and their parents.

RULE 29.6 STATEMENT

Respondent Brentwood Academy does not have a parent corporation, and no publicly-held company owns 10% or more of BA's capital stock.

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STATEMENT OF THE CASE

This case is not about whether the state can limit athletic recruiting. All agree that preventing the exploitation of middle and high school students justifies some reasonable limit on recruiting conduct. Had the Tennessee Secondary School Athletic Association ("TSSAA") chosen to do so, it could have directly prohibited Brentwood Academy ("Brentwood") from engaging in *conduct* disfavored by TSSAA, as it has now done. TSSAA, however, did not prohibit the conduct but, instead, punished Brentwood for *speech* about that conduct. The issue, then, is whether TSSAA may punish Brentwood's speech simply because it facilitates conduct TSSAA dislikes but does not prohibit. Brentwood was punished for purely informational speech. TSSAA's punishment of that speech is a classic First Amendment violation. And, the process TSSAA used to punish Brentwood violated procedural due process.

Recognizing this, TSSAA asks the Court to excuse its unconstitutional actions by creating a new exception to the First Amendment and Due Process Clause. TSSAA claims this exception is warranted because Brentwood allegedly contracted away its speech and due process rights through its participation in TSSAA. This theory has no support in the Court's precedent or in the facts of this case. Brentwood was entitled to full protection under the Constitution, and the Sixth Circuit's holding that TSSAA violated Brentwood's First Amendment and due process rights should be affirmed.

Overview. In 1997, twelve boys agreed to attend high school that fall at Brentwood, a private parochial school with a nearly 100% rate of college attendance. They had "applied, been tested and admitted, and signed enrollment contracts with Brentwood." 304 F. Supp. 2d 981, 989 (M.D.

Tenn. 2003). Brentwood considered them to be enrolled at the school, although not yet matriculated.[1]

In April 1997, Brentwood's football coach Carlton Flatt sent a letter (JA 119)[2] "to all [twelve] incoming ninth grade male students," inviting them to attend spring football practice in May. 304 F. Supp. 2d at 989. The letter was followed by a telephone call to the parents of each student to reaffirm that participation in spring practice was entirely optional. Students who received the letters were entering high school and, therefore, had to change schools upon graduating from middle school One accepted student, who had not signed an enrollment contract, was not sent the "spring practice letter." *Id.*; 442 F.3d at 428.[3]

The boys receiving the spring practice letter ("SPL") were authorized under the rules of the relevant governmental regulatory body – TSSAA – to participate in spring practice, even though they had not yet matriculated. *Id.* at 419 n.2.

In 1997 Brentwood faced a unique situation. Ray Marley, a Grassland Middle School student, had been cleared by TSSAA to lift weights at Brentwood during 1996-97. Marley planned to matriculate at Brentwood in fall 1997 and wished to attend spring football practice. Flatt wanted to avoid any perception of favoritism for Marley, whose father was a coach and who was aware of the spring practice opportunity since he had been working out in the Brentwood weight room. 304 F. Supp. 2d at 997 n.14 (finding that "[TSSAA] told … Flatt to just get a letter … from the father

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[1] For discussion of this issue, *see* 442 F.3d at 418 n.1, 428, 429 n.13; JA 333 (Pitts); 339-40 (Haguewood).

[2] "JA" (joint appendix in this Court); "CAJA" (joint appendix in Sixth Circuit); "Pet. Br." (Petitioner's Brief in this Court); BIO (Brief in Opposition in this Court); Tr. (trial transcript).

[3] The communications "caused no actual harm and did not reasonably threaten harm to students, parents, or any legitimate governmental interests;" they were "consistent with … TSSAA's legitimate governmental interests." 304 F. Supp. 2d at 995. "Neither students nor parents were exploited in theory or in fact." 442 F.3d at 428.

indicating his intent to send [Marley] to Brentwood … and it would be permissible."); *see* Appendix.

"[T]o avoid singling out any students, particularly Ray Marley," Flatt sent the SPL in April 1997 "to all incoming ninth grade male students." 304 F. Supp. 2d at 989. All students who got the SPL attended the practice. JA 278.

TSSAA's Executive Director, Ronnie Carter, had concerns about the number of students attending spring practice, believing that that opportunity had "outlived its purpose." CAJA 703. Faced with a situation of which he disapproved, but that the existing rules permitted, Carter punished the *speech* that resulted in the disapproved but legal outcome.[4] He said that Brentwood's speech was "undue influence" in violation of TSSAA's recruiting rule and punished Brentwood severely.[5] Application of the rule in this case was to "post-recruiting activity." The "parents and students who received the [SPL] and calls had already completed any 'recruiting' process." 304 F. Supp. 2d at 996.

The issue before the Court has nothing to do with the educational soundness of allowing incoming students to participate in spring sports practices. TSSAA had – and has now exercised (442 F.3d at 419 n.2) – the ability to ban such

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[4] The government has declined to enforce or defend a ban on speech about legal activity. *Magee v. United States*, 93 F. Supp. 2d 161 (D.R.I. 2000); *N. Y. State Bar Ass'n v. Reno*, 999 F. Supp. 710 (N.D.N.Y. 1998).

[5] TSSAA imposed a four-year probation for Brentwood's athletic program, a two-year suspension of playoff eligibility for football and basketball and a $3,000 fine. JA 269-71. The rule guidelines provide "[v]iolation of the recruiting rule shall cause the student to be ineligible at the school in violation, and a penalty shall be placed against the school." JA 181. Initially, four of the twelve students were declared ineligible; three were black and the fourth was Native American. Despite the guideline, the eligibility of the remaining students (all white) was never questioned. JA 243, 444. Ultimately, no students lost eligibility. JA 270-71

practices. That is the appropriate resolution, not punishing speech about an activity allowed by TSSAA rules.

To deflect attention from the simplicity of the First Amendment case, TSSAA has erected a monolithic, undifferentiated strawperson – "athletic recruiting." But in the context of this "as applied" case, this abstraction is a non-issue. All agree that preventing exploitation of students justifies reasonable limits on recruiting. But Brentwood has not been punished for "offering an incentive or inducement to a student," JA 181, but for speech about an approved activity – speech that presented an opportunity, with twelve students attending an approved activity that eleven would not have known about but for the speech.

Throughout this litigation, Brentwood has supported a recruiting rule "that prevents inappropriate conduct" but that "allows the school to tell its story." JA 435. Government can limit *conduct* to prevent "harmful behavior" in ways it cannot limit *speech*. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 579 (1995). TSSAA refuses to make that distinction.

No TSSAA witness distinguished between speech and conduct. They simply condemned athletic recruiting in general. For example, Dr. Sharon Stoll did not understand the difference between speech and conduct: "I don't understand. Is there a difference between speech and conduct? ... I don't see a difference." JA 382-83; CAJA 1768. Dr. George Sage opined that "speech is [merely] a form of conduct." JA 411.

So, the real question is: whether, consistent with the First Amendment, an informational letter and a follow-up phone call to parents that were non-coercive, non-threatening and non-harassing can be "punished for disseminating information about an optional activity for incoming Brentwood students" under an "undue influence" standard by a "governmental entity exercising regulatory authority" when all students receiving the information "had applied,

been tested and admitted and signed enrollment contracts with Brentwood." 442 F.3d at 430, 421, 418.

Brentwood contends that the First Amendment protects this pure speech against punishment by a government regulator, regardless of the regulator's source of authority. *See* Section I.A.2, *infra* (discussing cases).

TSSAA takes a different position. It views negatively the fact that the boys receiving the SPL letters chose to attend the authorized practice. Pet. Br. 33 (SPL "caused 12 middle school students . . . to attend Brentwood's spring football practice"). This sequence of events – communication and consequence resulting from that communication – is what TSSAA objects to and punishes. But the First Amendment in its most basic essence protects this very sequence. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 790-91(1978) (communication "may influence the outcome" of a decision; "this would be its purpose"); *Meyer v. Grant*, 486 U.S. 414, 426 n.7 (1988).

If, as the lower courts have correctly held, the benign student-focused objectives of protecting children (i) against exploitation or (ii) against exalting athletics over academics are unsustainable here – even pretextual – and cannot be the basis of TSSAA's claim, what precisely is going on?[6]

The truly pernicious (and dangerous) claim that TSSAA makes – and one that it did not make until the 2001 appeal, 262 F.3d 543, 557[7]– is its claim that "competitive equity" justifies censorship of First-Amendment-protected pure non-commercial speech.[8] Both lower courts rejected this justification; so should this Court. Given that this Court

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[6] TSSAA's Bernard Childress stated that determining if the SPL actually harmed the students would serve no purpose. CAJA 1074; JA 467.

[7] Regulation of speech must serve "actual," not merely "stated" interests. *Edenfield v. Fane*, 507 U.S. 761, 768 (1993). TSSAA has not shown that "competitive equity" is an "actual" purpose. This Court "need not pursue that inquiry." *Republican Party v. White*, 536 U.S. 765, 778 (2002).

[8] This interest has no application here; the communications went only to students who had already signed enrollment contracts at Brentwood.

has rejected punishment of flag burning and cross burning[9] on First Amendment grounds, TSSAA's position "trivialize[s] the freedom protected in [earlier cases]." *Rumsfeld v. FAIR*, 126 S. Ct. 1297, 1308 (2006).

There is a fundamental difference between the "competitive equity" interest TSSAA now asserts and its other two interests. Competitive equity shifts the focus from the student's interest, which is the unit of analysis under the "exploitation" and "subordination" theories, to the collective interest of the schools, JA 409-10, thereby necessarily making the student's interest subservient to that of the association, and, to some degree, commodifying the students themselves. The competitive equity rationale places the student's educational interests in substantial tension with the association's regulatory interests. It treats students as objects, as "mere creature[s] of the state," which *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925), condemns. This approach turns the role of government – facilitating educational opportunities – on its head, and disrespects the primacy of student/family choice.

Addressing that tension, the district court held that the "substantial government interest in informed choice trumps any government interest in controlling which schools or teams win athletic contests" because "[a]cademics are more important than athletics." 304 F. Supp. 2d at 994. Since TSSAA asserts an interest in subordinating athletics to academics, it is hard-pressed analytically to take issue with that holding. The Sixth Circuit agreed, holding that competitive equity is not a "substantial" governmental interest justifying a restraint on speech. 442 F.3d at 426-27.

Targeted non-threatening, non-coercive school-initiated communication with incoming students "may influence the outcome" of a student's decision to attend a particular school or activity. "[T]his would be its purpose."

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[9] *Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning); *Virginia v. Black*, 538 U.S. 343 (2003) (cross burning).

But TSSAA may not "restrict the speech of some [schools] in order to enhance the relative voice of others." That is "wholly foreign to the First Amendment." *Bellotti*, 435 U.S. at 790-91. "TSSAA cannot control school choice through censorship." 13 F. Supp. 2d 670, 689.

As applied to First-Amendment-protected speech, TSSAA's "competitive equity" interest boils down to this: if students and parents are made aware of educational opportunities through targeted non-threatening, non-coercive, non-harassing, school-initiated pure speech, competitive equity is threatened because the information might influence the students' educational choice. TSSAA's position does not require or even contemplate the existence of any conduct unprotected by the First Amendment or of a "pledge or promise of conduct."[10] The "undue influence" is the speech itself and its impact on the listeners, who might be influenced by its message.[11]

From this and from the standard that TSSAA proposes, what drives TSSAA's regulatory objective becomes clear – a sense that public schools have a form of proprietary interest in students zoned to them. TSSAA seeks to protect that proprietary interest by isolating students and their families from hearing about educational opportunities.

TSSAA Board of Control member Morris Rogers was not subtle in describing the "obvious" purpose of the recruiting rule – it is "really for protection of schools and coaches," by "[k]eep[ing] them from losing their best players." JA 368-69. The sense of community pride in winning a statewide athletic championship and its attendant protectionism are recurrent themes.

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[10] *See Republican Party*, 536 U.S. at 770 (distinguishing between speech and pledging or promising to engage in certain conduct).

[11] *Cf. 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 518 (1996) (Thomas, J., concurring) (an interest to keep people "ignorant in order to manipulate their choices in the marketplace ... is per se illegitimate").

Jack Roberts of Michigan's TSSAA counterpart stated that "[t]he sports events of our high schools are a source of pride;" communities can "develop[] a sense of ownership of these children" (considering them "our kids"), and "can develop resentment" if, "for academic or athletic reasons," students choose to attend an independent school, "[e]specially if they are really good athletes." JA 407-08. A local public school principal resented Brentwood because it had a "great coaching staff in football," and "good coaches... can attract higher quality athletes." CAJA 1821.

Scott Brunette, Nashville public schools athletic director testified that public school officials and coaches see students zoned to their schools as "our kids," and "complain about private schools ... beating us with our own kids" or "taking [our] students." JA 392; *see also* JA 349.

This protectionism – believing that a high school has a proprietary interest in students zoned to that school – is reinforced in TSSAA's broad "feeder pattern" exception to the recruiting rule. Contact otherwise prohibited by the recruiting rule is permitted within a feeder pattern (typically, middle schools students zoned to a particular high school). Brentwood's speech would not have been a "violation" if directed at students within a feeder pattern. JA 329-39; 389-92; 462-64; 477; 304 F. Supp. 2d at 995-96.

The district court found that, "[a]s applied in this case, there is no legitimate reason to permit speech in a feeder pattern but prohibit the same speech by Brentwood Academy to its incoming students." *Id.* at 995-96. That is, the "exploitation" and "subordination" interests are the same inside and outside the feeder pattern. Such under-inclusiveness calls into question the *bona fides* of the "exploitation" and "subordination" interests and reinforces the point that protectionism and isolation are in play here.[12]

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[12] *See Republican Party*, 536 U.S. at 780 (a "woefully under-inclusive" restriction in regard to a purported objective can "render belief in that purpose a challenge to the credulous"); *City of Ladue v. Gilleo*, 512 U.S.

In this regard, the First Amendment standard put forth by TSSAA is particularly and strikingly inappropriate. As stated by the Government: application of a rule is valid if "reasonable in light of [a government] program's purposes." Br. of U.S. 13. This is the First Amendment standard adopted in the context of *prisons*.[13] Its adoption here would transplant an existing body of doctrine designed for a specific, specialized, and very different context to a more general regulatory setting.

At bottom, then, TSSAA and its friends propose adoption of a First Amendment standard designed for the unique circumstances of the prison – a standard that "raise[s] grave First Amendment concerns outside the prison context" – for a regulatory setting involving education. *Thornburgh v. Abbott*, 490 U.S. 401, 407 (1989).

This highlights a stark reality. TSSAA seeks an undemanding First Amendment regime that protects a school's proprietary interest in its zoned students and isolates students from truthful information that can influence their choice of educational options.[14] Dilution of First Amendment protection in the prison setting, where a "particular prisoner's lawful sentence" may take away "a right enjoyed by free persons,"[15] may be appropriate, but

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43, 52-53 (1994) (under-inclusiveness "diminishes the credibility of the government's rationale for restricting speech").

[13] A prison regulation that burdens speech is valid if "'reasonably related' to legitimate penological objectives" and not an "'exaggerated response' to those concerns." *Turner v. Safley*, 482 U.S. 78, 87 (1987).

[14] Government can *mandate* disclosure of truthful information to assure informed decisionmaking about important personal choices without imposing an undue burden on those choices. *See Planned Parenthood v. Casey*, 505 U.S. 833, 881-82 (1992) (upholding disclosure requirements for abortions). Since government can *mandate* such disclosures without creating an undue burden on important personal choices, it is hard to see how government can *prohibit* access to that very type of truthful information to prevent "undue influence" regarding educational choice.

[15] *Overton v. Bazzetta*, 539 U.S. 126, 139 (2003) (Thomas, J., concurring in judgment).

such a regime "raise[s] grave First Amendment concerns outside the prison context," as, unlike some other nations, ours is not a "prison-country."[16]

The Recruiting Rule and Its Interpretation. The recruiting rule[17] prohibits the "use of undue influence on a student (with or without an athletic record), the parents or guardians of a student by any person connected, or not connected, with the school to secure or to retain a student for athletic purposes." JA 181. The term "undue influence" is defined merely as "exceeding what is appropriate or normal." *Id.* The terms "appropriate or normal" are not defined. 13 F. Supp. 2d at 686. The rule applies to students and parents[18] and to both conduct and speech "that does not involve illegal inducements ..., threats, coercion, and harassment." CAJA 3514, 3539 (Req. No. 3).

A school is responsible for the use of "undue influence" (including speech) by persons "not connected" with the school and over whom the school has no control or even knowledge. This could apply to pure, informational communication about a school's virtues (or its athletic program) to a prospective student or parent by a local barber, a teacher, a religious counselor, or even, presumably, by a non-custodial divorced parent. TSSAA evaluates such

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[16] John Podhoretz, *Nightmare Come True: Love and Distrust in the East German Police State*, THE WEEKLY STANDARD, MARCH 12, 2007 at 37.

[17] TSSAA's regulatory jurisdiction stems from annual member school enrollments. Brentwood has routinely signed the obligatory form card, agreeing to "conduct its athletic programs ... in accordance with the rules and decisions of the TSSAA." JA 231.

[18] Michael Hammond, a TSSAA Board of Control member, stated that there is no difference whether parents or students receive the communication, "since parents probably are going to communicate to the child and they are going to get the information anyway... [s]o there is still an influence factor there." CAJA 1299; *see* JA 412, 415. Failure to distinguish between parents and children is problematic under the First Amendment. *See Lorillard Tobacco Co. v. Reilly*, 533 U. S. 525, 562-64 (2001).

allegations under an *ad hoc* "totality-of-the-circumstances" approach. JA 484.

The recruiting rule applies the "undue influence" standard to students "with or without an athletic record" and focuses on the use of "undue influence ... for athletic purposes." However, TSSAA enforces the "for athletic purposes" component without requiring intent as an element of an offense. 304 F. Supp. 2d at 992. TSSAA's Executive Director testified that "[j]ust about all of your violations are unintentional." JA 478. TSSAA concedes that Brentwood had no intent to violate the recruiting rule, JA 257-58, 271; the parties have stipulated that Flatt "had no intention of violating the Recruiting Rule by mailing the [SPL] and making the telephone calls." JA 275 (¶ 40). The district court noted that "Carter failed to explain how he could determine whether influence was 'for athletic purposes' without considering intent." 304 F. Supp. 2d at 992 n.5. The lack of an intent requirement chills speech in other areas. JA 436-41.

Considerable interpretive commentary follows the recruiting rule. JA 181-85. At summary judgment, it seemed that this commentary provided examples of *per se* violations of or safe harbors from the "undue influence" standard. 13 F. Supp. 2d at 686-87, *see also* Tr. 2113-23; JA 114-16, 182, 238-44, 269-71, 425-27, 475, 482-84.

The commentary's *per se* and safe harbor characteristics led the Sixth Circuit to conclude, at summary judgment in 2001, that the imprecision of the "recruiting rule by itself" was mitigated by the "authoritative instructions" of TSSAA, which offset the vague "undue influence" standard as applied to Brentwood. 262 F.3d at 556-57.

At trial, however, TSSAA disavowed this bright-line-rule interpretation of the commentary; analysis under the recruiting rule requires a standardless totality-of-the-circumstances approach. JA 412-13, 417. There are "not violations of questions" but only of the "undue influence"

standard; TSSAA "put[s] that all into the context of what has occurred," JA 429, to "determine whether all the factors that are there" constitute "undue influence." JA 428.

Carter distinguished his considerable discretion under the recruiting rule from his non-discretionary role in interpreting the eligibility-related age and eight-semester rules. JA 423-25, 431. For the recruiting rule, "the questions and answers [*i.e.*, the commentary] don't matter ..., it is not the rule." JA 483. The commentary is not binding. JA 366-67; 368, 465. In interpreting the recruiting rule, the rule itself "is all that really counts, everything else underneath it, the interpretive commentary is discretionary and it depends upon the totality-of-circumstances." JA 484.

The district court found that the "interpretive commentary to the Recruiting Rule is not a binding interpretation of the Recruiting Rule, and ... the Executive Director and the Board of Control have the discretion to disregard the interpretive commentary," and they "have done so." 304 F. Supp. 2d at 986, 995 n.8.

The recruiting rule and the commentary have been modified a number of times since its adoption, when its focus was on the transfer of students from one school to another. JA 286-87. Carter was unable to identify a recruiting problem in Tennessee that "we need to fix." JA 480. During the 1984 revision process (JA 286-87), TSSAA did not consult or consider any outside authority, books, studies, or experts when adding the interpretive commentary. JA 480-82, 484-85. It looked at no empirical research "about the harms to students or their parents of athletic recruiting at the high school level." JA 485.

One final procedural point about the recruiting rule and its interpretation: TSSAA presented no evidence that it has considered either the impact of the recruiting rule on speech or non-speech alternatives. "[I]n the last ten years," TSSAA had not "ever considered alternatives to restricting speech in looking at the recruiting rule." JA 487-88.

Insistence on rigorous procedural safeguards is an important bulwark of the First Amendment. The First Amendment requires TSSAA to implement a "process," when the recruiting rule affects speech, that provides for "a careful calculation of the speech interests involved." Even when regulating other things, government must consider the regulation's impact on speech. *Lorillard*, 533 U.S. at 562. That did not occur and provides a procedural basis for affirming here. TSSAA cannot, as it must, "demonstrate a careful calculation of the speech interests involved." *Id.* TSSAA has never recognized that its regulation of speech is more limited than its regulation of conduct.

The Content-Neutrality Issue. At summary judgment, the district court rejected TSSAA's time, place or manner ("TPM") defense – that punishment was unrelated to the content of Brentwood's communications with students and parents, that the recruiting rule "is not an attempt to stifle speech, but is a valid time, place and manner restriction." 13 F. Supp. 2d at 687-88.

In 2001, on remand from this Court, TSSAA said its recruiting rule "must ... be viewed as a reasonable restriction on the time and manner" of Brentwood's "solicitation." The SPL was "recruiting conduct" proscribable "regardless of the specific content of the message" or its "persuasive effect." Its enforcement of the recruiting rule was "[s]tate regulation ... triggered by the event rather than the content of any speech during the event." BIO 12-13. The Sixth Circuit accepted TSSAA's TPM theory, noting that the rule was "regulatory action," that addressed "secondary effects" unrelated to the speech's content. 262 F.3d at 552-54, 558.

But, at trial, TSSAA disavowed a content-neutral interpretation of the recruiting rule and the interpretive commentary. TSSAA identified no content-neutral "secondary effects" toward which the regulation of speech was aimed. 304 F. Supp. 2d at 996 n.12. TSSAA acknowledged that it focused, case-by-case, on the content of

the speech and its impact on the recipients in determining whether Brentwood's speech constituted "undue influence." The district court found: "[T]he preponderance of the credible evidence at trial is that the substantive 'content' of the [SPL] and calls mattered and was a significant factor in the TSSAA's decision that the letter and calls constituted 'undue influence' and violated the Recruiting Rule." In sum, "TSSAA penalized [Brentwood] for the substantive 'content' of the [SPL] and calls and the message conveyed." *Id.* at 992 n.4, 996 n.12 ("[A]pplication of the Recruiting Rule ... in this case is with reference to the content of the speech and [its] impact").

Since content-neutrality is a threshold requirement of a TPM defense, *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323 n.3 (2002), TSSAA cannot sustain its TPM defense.

Non-Speech Alternatives. TSSAA has rules not involving speech that are designed to foster competitive equity. These rules are not at issue in this proceeding.[19]

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[19] First, the recruiting rule itself may be applied to non-speech conduct without the risk of running afoul of the First Amendment – *e.g.*, prohibiting "offering an incentive or inducement to a student with or without an athletic record." JA 181. Second, for purposes of championship competition, public schools and Brentwood do not compete against each other; they are separated into different Divisions. JA 145-46. Third, Championship competition among schools within each Division is grouped based on the size of the student body of the school. Fourth, there are detailed restrictions on student transfers, including ineligibility for an entire year and forfeiture of games in which an ineligible student participates. JA 167-77, 191-92. In tension with the "subordination" principle, there is no exemption to the transfer rule "for bona fide academic purposes." JA 485. Fifth, "[n]o student shall be eligible to participate in any athletic contest... if he or she becomes 19 years of age on or before September 1." JA 161. Sixth, a "student shall be ineligible to compete in any sport if he or she attended a secondary school, or schools, for eight semesters." JA 158. Seventh, there are detailed restrictions related to a student's residence. JA 177-79. Eighth, financial aid is limited to non-athletic, need-based awards. JA 187-88.

The TSSAA Procedures. On July 29, 1997, Carter determined that Brentwood violated the recruiting rule and imposed immediate penalties. 304 F. Supp. 2d at 987.[20] Brentwood appealed, which was heard by Carter and three members of the Board of Control. "Brentwood Academy made a presentation at the appeal hearing, but the TSSAA presented no evidence." *Id.* On August 14, Carter "with the advice and consensus of the three members of the Board of Control, again found Brentwood Academy in violation . . . and imposed revised penalties." *Id.* Carter stated he was the decisionmaker, with the others being advisors, but the other Board members testified they were the decisionmakers. *Id.*

Brentwood appealed again to the entire nine-member Board of Control, which included the three who had participated in the prior appeal decision. Again, Brentwood "made a presentation to the Board of Control at a public hearing, and the TSSAA presented no evidence," *id.*, so Brentwood was unaware of the full nature and credibility of TSSAA's case. JA 394-403. After Brentwood put on its evidence, the Board of Control deliberated in a private "executive session" without Brentwood present. 304 F. Supp. 2d at 987. "[D]uring the private deliberations, Carter and the two TSSAA employees who had investigated the case answered questions from the Board of Control," while Brentwood "was excluded from the deliberations." On August 23, the Board of Control found that Brentwood had violated the recruiting rule and imposed new penalties. *Id.*

TSSAA investigators did not interview critical witnesses. JA 456-58, 474; CAJA 540, 1466-67. During the post-determination appeals, Brentwood had the burden of proving its innocence. JA 395. During the "executive session," when Brentwood was excluded, TSSAA staff and investigators presented their case, not subject to rebuttal or cross-examination. JA 467-68, 475-76, CAJA 770-771; 777-

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[20] The action letter also was sent to the local newspapers. JA 244.

787. The TSSAA investigators' notes (including Bart King) were discussed at the closed session but were not turned over to Brentwood. JA 393-403; 467-68; 475-76.

TSSAA's Board of Control "considered *ex parte*, post-hearing evidence" and, during its "private deliberations ... relied upon *ex parte* statements and documentary evidence from Defendant Carter and two TSSAA employees who investigated the allegations against Brentwood Academy," which had "no opportunity to reply to this *ex parte* evidence or even hear it and was prejudiced by the evidence and the private post-hearing process." 304 F. Supp. 2d at 1003. The Bart King allegations were discussed in the "executive session" and affected the "penalties imposed." *Id.* at 1004. TSSAA gave no indication that the King-related issues were still under consideration.

"Thus, the TSSAA and Carter misled Brentwood Academy about a person and allegation which ultimately mattered to the decision. Brentwood ... was denied an opportunity to defend this allegation head on." *Id.* at 1004 n.29. Applying the balancing test from *Mathews v. Eldridge*, 424 U.S. 319 (1976), the district court found the TSSAA procedures violated procedural due process. *Id.* at 1003-06. The appeals were "post-deprivation hearings" for due process purposes, and, thus, the truncated "right of reply" procedures in a pre-deprivation context were insufficient. But even if pre-deprivation, due process is violated "if the plaintiff is not informed of the evidence considered by the decision-maker." 304 F. Supp. 2d at 1005; *see also Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545-46 (1985).

The Sixth Circuit affirmed, holding that, in its executive session, TSSAA discussed the allegations regarding King, that Brentwood "did not have notice that the King matter was a possible basis for final TSSAA action against Brentwood," and that the "King issue influenced the penalties." 442 F.3d at 434-36. The due process

requirements imposed by the Sixth Circuit are far from onerous or excessive and were derived from the *Mathews* balancing factors: "notice of the evidence relied upon in penalizing Brentwood and an opportunity to respond to that evidence before penalties were imposed." *Id.* at 438. Even alleged enemy combatants get such protection. *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004).

SUMMARY OF ARGUMENT

The Sixth Circuit's straightforward application of constitutional law to TSSAA's regulatory activity should be affirmed. TSSAA seeks a "dispensation" from these standards, but "[p]leas for special treatment are hard to sell," 531 U.S. 288, 305 (2001). TSSAA has not made its case.

1. TSSAA acted in a regulatory capacity in punishing Brentwood's pure speech. TSSAA's punishment of Brentwood's speech contains classic First Amendment violations. Its action is subject to traditional First Amendment protection of regulatory conduct, regardless of the source of its regulatory authority.

2. TSSAA has not overcome the presumption against waiver of constitutional rights and, procedurally, cannot even raise the waiver claim. TSSAA's contract/waiver analysis ignores the importance of the speech interests of parents and students, who are subject to TSSAA rules, but who are not TSSAA members and whose First Amendment interests are compromised.

3. TSSAA's punishment of Brentwood's pure speech is an unconstitutional penalty on Brentwood's exercise of First Amendment rights. The government spending and public employee cases do not apply to TSSAA's direct and specific abridgment of Brentwood's First Amendment rights. TSSAA cannot define away Brentwood's First Amendment or procedural due process rights.

4. To satisfy its burden here, TSSAA must show actual harm that government constitutionally may proscribe. In an as applied challenge to punishment of pure speech under an *ad hoc*, discretionary "undue influence" standard, the focus is on how the discretionary standard is applied to particular facts and circumstances. Otherwise, there cannot be effective judicial review. If, as TSSAA contends, the analytical focus remains only at a general level and without regard for specific application, then Brentwood should be allowed to reassert its facial challenge.

5. TSSAA violated Brentwood's procedural due process rights by considering *ex parte* post-hearing evidence that Brentwood did not know was still relevant and to which it had no opportunity to reply. The *ex parte* evidence included investigative notes by TSSAA officials that were not given to Brentwood. TSSAA never had to establish its case or carry a burden of justification for punishing speech; the burden of justification at all times lay with Brentwood.

ARGUMENT

In General. When government restricts or punishes pure speech, as in this case, it bears a "heavy burden" of justification. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 504 (1952). A "citizen is entitled to seek out or reject ... influences without Government interference or control." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 817 (2000). This principle applies to all non-commercial speech, including films (*Burstyn*) and adult entertainment (*Playboy*), not just matters of public concern. A state may not dictate "the subjects about which persons may speak." *Bellotti*, 435 U.S. at 785.

"Government may not ... restrict individuals from disclosing information that lawfully comes into their hands in the absence of a 'state interest of the highest order.'" *United States v. Aguilar*, 515 U.S. 593, 605 (1995). This foundational principle has been upheld against extremely

important governmental policy objectives.[21] Yet, TSSAA wants a special dispensation for football "equity."

The First Amendment also protects the rights of potential listeners to hear what others have to say. "It is now well established that the Constitution protects the right to receive information and ideas." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969), *cf. Thomas v. Collins*, 323 U.S. 516, 534 (1945) (requiring organizers to register before soliciting union membership violates both the labor organizer's right to speak and the rights of workers "to hear what he had to say"). The right to receive information is "nowhere more vital" than in the nation's schools and universities. *Shelton v. Tucker*, 364 U.S. 479, 487 (1960).

First Amendment doctrine distinguishes between content-based and content-neutral forms of government regulation. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641-43 (1994). *Content-neutral* laws – such as TPM restrictions – are subject to intermediate scrutiny. *See Thomas*, 534 U.S. at 323 & n.3.

Content-based restrictions are "presumptively invalid." *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992). "[G]overnment has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972). And a Court "cannot be influenced ... by the perception that the regulation in question is not a major one because the speech is not very important," as "all content-based restrictions on speech" warrant exacting scrutiny. *Playboy*, 529 U.S. at 826.

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[21] *See, e.g., Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979) (allowing publication of juvenile offender's name); *Landmark Commc'n, Inc. v. Virginia*, 435 U.S. 829 (1978) (upholding publication of information about confidential commission proceedings); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975) (allowing publication of rape victim's name); *Peel v. Attorney Registration & Disciplinary Comm'n of Ill.*, 496 U.S. 91, 109 (1990) (state has a "heavy burden" of justifying punishment of "dissemination of accurate factual information").

The strong presumption against content-based regulation of expression extends to prohibition of "discussion of an entire topic," *Consol. Edison Co. v. PSC*, 447 U.S. 530, 537 (1980), as government cannot choose "which issues are worth discussing or debating." *Mosley*, 408 U.S. at 96; *accord Carey v. Brown*, 447 U.S. 455, 462 n.6 (1980). Government's power to impose content-based limitations on expression "surely does not vary with the identity of the speaker." *Simon & Schuster, Inc. v. N. Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991). "Listeners' reaction to speech is not a content-neutral basis for regulation." *Forsyth County v. Nationalist Movement*, 505 U.S. 765, 134 (1992).

To justify a content-based regulation, government must show "that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987); *Simon & Schuster*, 502 U.S. at 118. The burden rests with the government, *Playboy*, 529 U.S. at 816, 818, and rigorous judicial scrutiny both of the importance of the objectives pursued and of the means/ends relationship applies.

So, the baseline for First Amendment speech issues requires the government regulator to justify its restriction of pure speech under a form of heightened scrutiny – *i.e.*, intermediate scrutiny under TPM analysis, or strict scrutiny if the regulation is content-based. This is well-established and straightforward. The initial debate below centered on whether TSSAA's punishment of Brentwood's speech was content-based. Regardless, TSSAA has been unable to meet its burden. In fact, TSSAA placed the burden on Brentwood. JA 395, 401, 467-68; CAJA 1485-1486.

The TPM Defense. TSSAA cannot sustain its TPM defense. At summary judgment, the district court rejected TSSAA's TPM defense. 13 F. Supp. 2d at 687-91. On appeal in 2001, the Sixth Circuit believed that enforcement

of the recruiting rule, while regulatory action, was not content-based since it regulated "secondary effects." The court remanded for trial on the "as applied" claim, allowing TSSAA to establish a TPM defense. 262 F.3d at 553-58.

TSSAA did not meet this burden. The district court held that, as applied, the recruiting rule was not narrowly tailored to achieve either the exploitation (no harm or threat of harm was shown) or the subordination (no singling out of athletes was shown) interest; the competitive equity interest was not "substantial" enough to justify censorship of speech. 304 F. Supp. 2d at 994-97. The Sixth Circuit affirmed. 442 F.3d at 425-31.

At trial, TSSAA conceded that the basis for its regulatory enforcement action against Brentwood was the impact of the communication on the students and their parents. The district court found that application of the recruiting rule was not "tailored to control any 'secondary effects,'" but was directed at the "content of the speech and the impact of the speech." 304 F. Supp. 2d at 996 n.12. Thus, contrary to the summary judgment record, the trial record established that TSSAA "penalized Brentwood ... for the substantive 'content' of the [SPL] and calls and the message they conveyed in this case." *Id.* at 992 n.4. "Listeners' reaction to speech is not a content-neutral basis for regulation." *Forsyth County*, 505 U.S. at 134.

These unchallenged factual findings insure that TSSAA cannot establish its TPM defense. Since content-neutrality is a prerequisite to a successful TPM defense, the lack of content-neutrality negates TSSAA's TPM theory.[22]

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[22] The TPM defense also fails because of TSSAA's excessive discretion. "[A]dequate standards" must exist to guide decisions and "render [them] subject to effective judicial review." *Thomas*, 534 U.S. at 323.

I. Heightened Scrutiny Applies To TSSAA's Use Of The Recruiting Rule On Pure Speech.

TSSAA's regulatory conduct directed at Brentwood is subject to conventional First Amendment scrutiny of regulatory conduct by the state. *See* BIO at 17.

A. TSSAA Is A State Regulator.

1. The State Action Holding.[23] TSSAA exists "to stimulate and *regulate* the athletic relations of the secondary schools in Tennessee." JA 134 (emphasis added). It was "organized to regulate interscholastic sport among the public and private high schools in Tennessee that belong to it." 531 U.S. at 291. This Court addressed the following issue in 2001: "[W]hether a statewide association incorporated to regulate interscholastic athletic competition among public and private secondary schools may be regarded as engaging in state action when it enforces a rule against a member school," a "private parochial high school." *Id.* at 290, 293. The Court's answer: "[T]he association's regulatory activity ... should be treated as state action." *Id.* at 291. It was for this regulatory function, exercised "in lieu of the State Board of Education's exercise of its own authority," *id.*, and as a "surrogate association" for the state board, *id.* at 300, that TSSAA was a state actor. TSSAA had been designated and recognized as the state's "regulator" of interscholastic athletics. *Id.* at 292-93.

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[23] Although TSSAA addresses the issue cursorily, the state action issue decided in 2001 is not in the Questions Presented, and, thus, is not properly before the Court. Even if it were, there would be no basis to revisit the Court's 2001 decision, which it described as being "nowhere near the margin," and as merely bringing an "outlying circuit" into "harmony" with "precedent otherwise uniform." 531 U.S. 288, 294 n.1, 304-05 (2001). Finally, Brentwood has addressed the propriety of reviewing this issue. *See* BIO 28-29. To be considered, the issue should be set for reargument.

This Court saw TSSAA's enforcement of the recruiting rule as regulatory conduct. It noted that this case "responds to a 1997 regulatory enforcement proceeding brought against ... Brentwood, a private parochial high school member of [TSSAA]." *Id.* at 293. TSSAA is restricting Brentwood's speech "as a government regulator," 442 F.3d at 423, and its regulatory conduct affects the First Amendment interests of students and parents, blocking them from receiving information that could influence their educational decisionmaking. In this case, the absence of information would have foreclosed participation in an approved school activity. As the Sixth Circuit noted, "TSSAA, in administering its rules and regulations and imposing penalties against member schools, acts as a regulator, not as an employer, contractor, or disburser of funds." *Id.* at 424.

2. The Source of Government Authority Does Not Determine TSSAA's Regulatory Capacity. According to TSSAA, conventional First Amendment analysis applies only to a state's exercise of sovereign police power over an unwilling citizen. TSSAA asserts that the *source* of government's authority (contract or sovereign) is controlling. This Court's decisions, however, mandate that conventional First Amendment principles apply to TSSAA's regulation of Brentwood's pure speech.[24] 442 F.3d at 422-24.

The critical First Amendment issue is the power of government officials to restrain speech, whether through exercise of sovereign or contractual authority. To qualify as "regulation," governmental suppression of speech need not stem from sovereign status. It can come from activities amounting to "informal censorship." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 69 n.9 (1963). Regulation can involve

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[24] TSSAA's position could lead to questionable and anomalous consequences. A restriction on speech adopted by a state university would receive toothless First Amendment protection, yet the same code adopted legislatively would receive exacting scrutiny.

sovereign authority, but it need not, as when government engages in certification or accreditation functions rather than licensure. Even in the licensure context, regulators may impose sanctions (*e.g.*, reprimands or censures) that do not involve exercises in sovereign power (*i.e.*, do not invoke the power of the state to prohibit conduct).

In *Bantam Books*, a state commission had authority "to educate the public concerning any book" tending to "corrupt[] ...youth," not prosecutorial authority. *Id.* at 59, 61-62. Despite the commission's lack of prosecutorial (sovereign) power, this Court analyzed the commission's impact on speech under conventional First Amendment doctrine. This Court has done the same in other non-sovereign settings, such as in public schools and state universities, which exercise contract power over students.

At the same time, this Court has narrowly circumscribed speech protections when government exercises sovereign power, as in the prison context. This Court has recognized that the constitutional rights of prisoners "are more limited in scope than the constitutional rights held by individuals in society at large," and has adopted a "deferential standard for reviewing prisoners' constitutional claims." *Shaw v. Murphy*, 532 U.S. 223, 229 (2001). An "inmate does not retain rights inconsistent with proper incarceration," *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003), since a sentence may "validly deprive[] the prisoner of a constitutional right enjoyed by ordinary, law-abiding, persons." *Id.* at 140 (Thomas, J., concurring in judgment).

Thus, the *source* of government's authority to punish speech is not determinative. As in the prison context, deference is called for in some situations in which government exercises sovereign power; in other cases (such as *Bantam Books*), exacting scrutiny is applied where government is not exercising sovereign power. No bright-line rule of deference exists with regard to the *source* of

government's regulatory authority. Instead, this Court has looked at the government function performed in restricting or punishing speech, the nature and importance of government's interests, and the impact of the suppression of speech on speakers, listeners and recipients of the speech.

In *Bantam Books*, this Court noted the importance of procedures to protect speech against curtailment and the absence of such procedures surrounding the commission. The commission argued that conventional First Amendment principles did not apply because it did "not regulate or suppress" speech but "simply exhorts" and advises booksellers. 372 U.S. at 66. That contention was "premised on the Commission's want of power to apply formal legal sanctions." That is, the commission asserted that it was not exercising sovereign power to suppress speech.

That the commission exercised no formal sovereign functions was immaterial. This Court found that the commission's conduct, a form of blacklisting, was designed and served to stop the circulation of publications. The commission's conduct was "a form of regulation that creates hazards to protected freedoms." The procedures fell "far short of the constitutional requirements of governmental regulation." *Bantam Books*, 372 U.S. at 70, 71.

Similarly, in *Conrad*, 420 U.S. 546 (1975), this Court applied conventional regulatory doctrine to proprietary operation of a municipal theatre. The existence of excessive discretion by public officials in contracting triggered the same procedural requirements as in sovereignty-based licensing. *Id.* at 554 & n.7. *Conrad* applied First Amendment principles from the licensing cases to the city's decision not to contract with "Hair" in the municipally-run theatre. The city's decision not to contract was "indistinguishable in its censoring effect from the official actions" in the licensing cases. *Id.* at 552. "[R]estraints" on speech take a "variety of forms." *Id.* at 553.

The contract was "in effect, a license or permit" with approval based on the "exercise of judgment." *Id.* at 554 & n.7. *Conrad* accordingly applied conventional First Amendment "prior restraint" doctrine, although derived from cases involving restraints "embedded in the licensing system itself." *Id.* at 553. The contractual form and its non-sovereign source did not save the restraint from being considered a "prior restraint" on speech subject to First Amendment principles applicable to sovereignty-based licensing cases, *id.* at 555; the "elements of prior restraint identified in [the licensing cases] were clearly present in the system by which the Chattanooga board regulated the use of its theatres." *Id.* at 554; *accord Forsyth County*, 505 U.S. at 131; *Thomas*, 534 U.S. at 321; 442 F.3d at 423-24.

Ibanez v. Florida Bd. of Accountancy, 512 U.S. 136 (1994), also demonstrates the baselessness of TSSAA's asserted doctrinal principle. Ibanez practiced law and also was a certified public accountant (CPA). With one exception, accounting "activities performed by CPA's can lawfully be performed by [unlicensed] non-CPA's." *Id.* at 139 n.3.[25]

Ibanez voluntarily subjected herself to the Board of Accountancy, which censured her for using CPA and CFP (certified financial planner) designations. Since Ibanez did not need Board approval to practice law or accounting, the Board had no sovereign authority over her. It exercised a credentialing or certification function, but had no authority to require Ibanez to stop practicing accounting – only to stop using certain designations.

Although the Board exercised non-sovereign certification authority and imposed censure (a non-sovereign

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[25] Florida's "Title Act" requires no license to perform accounting functions except auditing. Accountants may seek the "title" of CPA as an imprimatur of a governmental entity and voluntarily subject themselves to the board's regulatory authority. *Ibanez*, 512 U.S. at 139 n.3.

penalty), this Court applied traditional commercial speech doctrine from the licensing cases. Ibanez voluntarily submitted to the Board's regulatory jurisdiction to receive its imprimatur; Brentwood voluntarily submits to TSSAA's regulatory authority to participate effectively in organized interscholastic athletics. Just as the full panoply of commercial speech protections applied in *Ibanez* to a disciplinary proceeding in the non-sovereign regulatory context, so does the full panoply of non-commercial speech protections apply to TSSAA's regulatory disciplinary proceeding against Brentwood.

In *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), the state board of education asserted "power to condition access to public education on [saluting the flag]." *Id.* at 630. The board regulated public schools (non-sovereign power) and private schools (sovereign power). *Id.* at 626 n.1. By resolution, the board imposed a compulsory flag salute, which applied only in *public* schools, *id.* at n.2, and was implemented as a "condition [of] access to public education." *Id.* at 630. Even though "[p]arents have the privilege of choosing which schools they wish their children to attend" so that attendance at public school was voluntary, *id.* at 657 (Frankfurter, J., dissenting), this Court applied the "grave and immediate danger" First Amendment standard applied in criminal cases. *Id.* at 639-42.

In *Bd. of Regents v. Southworth*, 529 U.S. 217 (2000), the question was whether a public university may require its students to pay an activity fee that supports extracurricular speech. This Court held that objecting students were entitled to certain First Amendment "safeguards with respect to the expressive activities which they are required to support." *Id.* at 229. Students voluntarily (contractually) enroll in a public university. Nevertheless, the Court applied conventional First Amendment principles to assure that a standardless referendum procedure did not undermine traditional First

Amendment protections – that funding for a student organization's speech "not depend upon majoritarian consent." This was a contractual setting, yet, traditional First Amendment principles were "controlling." *Id.* at 235.[26]

In *Keller v. State Bar*, 496 U.S. 1 (1990), state law compelled lawyers to join and pay dues to an integrated bar. In *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1976), a collective bargaining contract mandated payment of union dues by public employees. This Court upheld both mandatory payments but held the bar and union could only spend mandated dues on matters germane to regulation of the legal profession and collective bargaining, respectively. Contributions compelled by government for *political* purposes infringe First Amendment rights, whether compulsion derives from positive law (*Keller*) or contract (*Abood*). The First Amendment principles are identical.[27]

In sum, there is no basis for TSSAA's claim that the *source* of government's authority controls First Amendment analysis. Government can act as a regulator in a variety of different contexts. "[R]estraints" on speech take a "variety of forms" subject to conventional First Amendment review. *Conrad,* 420 U.S. at 553. And traditional First Amendment protections attach even to speech that government may view as "not very important." *Playboy*, 529 U.S. at 826. Private speakers get to choose their topic; government regulation of a speaker's topic is subject to strict scrutiny. *Bellotti*, 435 U.S. at 785 (government may not dictate "the subjects about which persons may speak"). The "contract" thesis is a feint.

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[26] *See also Widmar v. Vincent*, 454 U.S. 263, 264-65 n.3, 270, 276 (1981); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 834-35 (1995); BIO 20-21.

[27] *See* BIO 22; *cf. Tool Box v. Ogden City Corp.*, 355 F.3d 1236 (10th Cir. 2004) (*en banc*) (city used "protective covenants" (contractual power) to prohibit First-Amendment-protected nude dancing; court analyzed covenants (contract power) as regulatory zoning (sovereign power)).

B. TSSAA Violated Basic First Amendment Doctrine.

TSSAA's enforcement action involved violations that basic First Amendment doctrine is designed to guard against. The seven violations described in this section demonstrate why traditional First Amendment protections do and should apply to TSSAA's punishment of Brentwood's pure speech and why the special dispensation from First Amendment doctrine sought by TSSAA for its regulation of high school athletics should be rejected.

First, speech and conduct must be distinguished, which TSSAA has not done. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002) ("[T]he Court's First Amendment cases draw vital distinctions between words and deeds"). TSSAA punished speech about a permissible activity, a core First Amendment violation. *See* note 4, *supra*. The harms TSSAA focuses on largely stem from attendance at the approved practice itself. *See* Pet. Br. at 8-9 & n.2. Non-speech regulatory alternatives exist, including a ban on attending spring football practice by incoming students, which has been implemented. 442 F.3d at 419 n.2; *see* note 19, *supra*. If the Government could achieve its interests in a manner that does not restrict speech, or that restricts speech less, the Government must do so. [R]egulating speech must be a last – not first – resort." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002). But speech restriction is the only resort TSSAA has visited.[28]

Second, "[i]nsistence on rigorous procedural safeguards" is an important First Amendment "bulwark[]." *Conrad*, 420 U.S. at 561. Since the recruiting rule impinges on speech, the First Amendment requires TSSAA to implement a "process" that provides for "a careful

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[28] Faced with a "plausible, less restrictive alternative," government must prove the alternative "to be ineffective," *Playboy*, 529 U.S. at 823, which TSSAA has not done. JA 487-88.

calculation of the speech interests involved." Even when regulating other things, government must consider the impact of the regulation on speech. *Lorillard*, 533 U.S. at 562. That did not occur and provides a procedural basis for affirming. TSSAA cannot, as it must, "demonstrate a careful calculation of the speech interests involved." *Id.* TSSAA's regulation of speech is much more limited than its regulation of conduct. "TSSAA needs to go back to the drawing board and start over." 13 F. Supp. 2d at 690.[29]

Third, TSSAA burdens more speech than necessary. The means used to regulate speech must not "burden substantially more speech than is necessary to further the government's legitimate interests." The recruiting rule's sweeping coverage and application mean that a "substantial portion of the burden on speech does not serve" TSSAA's goals. *Ward v. Rock Against Racism*, 491 U.S. at 781, 799 (1989); 13 F. Supp. 2d at 688 n.14.

Fourth, TSSAA's approach to speech promotes self-censorship and a chilling effect on protected expression. The recruiting rule bars undue influence "for athletic purposes," but there can be a violation "without an 'intent' to violate." 304 F. Supp. 2d at 992. The risk of discipline for an unintentional violation has precisely the kind of self-censoring, chilling effect that the First Amendment guards against. *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988).[30] Brentwood is inhibited from

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[29] The template embraced in *Rumsfeld v. FAIR*, 547 U.S. 47 (2006), in which the Court deferred the broader issues, could well be adopted here. A straightforward way to affirm exists because TSSAA violated the First Amendment by (i) failing to recognize that its authority is more circumscribed when regulating speech than conduct; and (ii) as a consequence, abdicated its duty to "demonstrate" that it had engaged in a First-Amendment-required "process" of undertaking "a careful calculation of the speech interests involved." *Lorillard*, 533 U.S. at 562.

[30] The mixed-skill case illustrates the potential for abuse and for self-censorship. JA 340. Does the "athletic purpose" concept, which does not require intent, apply when a school contacts a gifted student with

proactively pursuing interests in diversity, JA 439-44 (Masters), and families are inhibited from receiving targeted information from schools, thereby adversely affecting their interest in acquiring information about schools or, after signing an enrollment contract, program activities.[31]

Fifth, there is excessive discretion in the administration of the recruiting rule. *Forsyth County*, 505 U.S. at 133 & n.10. The interpretive commentary is not binding, and the "undue influence" standard is interpreted under an amorphous, "totality-of-circumstances" standard. JA 484. That is, "the recruiting rule by itself" governs, and does not constrain TSSAA's discretion. 304 F. Supp. 2d at 986, 992, 995 & n.8; 442 F.3d at 428. These factual findings are amply supported in the record.[32]

The repeated assertion that schools should "[p]ick up the telephone and call" Carter, if in doubt about an interpretation of whether particular speech is "undue influence," is far from acceptable. JA 432, 421-24. This makes Carter a "'licenser' – an administrative official who enjoy[s] unconfined authority to pass judgment on the content of speech," a "core abuse" against which the First Amendment is directed. *Thomas*, 534 U.S. at 320. As the district court noted, that "TSSAA allows members to seek advice about how the Recruiting Rule will be interpreted does not eliminate the discretion that it retains to apply the subjective terms in an arbitrary fashion." 13 F. Supp. 2d at

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many talents who, unbeknownst to the school, is also a gifted athlete? CAJA 1505-07 (describing effort to attract student to Roxbury Latin School whom Obel-Omia saw performing *A Raisin In The Sun*, and who "turned out to be not only a wonderful actor … but [also] a championship wrestler" who later wrestled at Harvard). To be safe, a school must either self-censor or prophylactically refuse to allow such a student to participate in sports, a punitive policy that, in fact, singles out athletes.

[31] There is a need for proactive targeted communication to attract lower-socioeconomic-level students. JA 305-07, 310-11; 354-57; 359-60.

[32] *See* JA 366-67; 421-23, 482-84; Tr. 1052-53.

693 n.26. Such "unbridled discretion" violates the First Amendment. *Forsyth County*, 505 U.S. at 133 & n.10.[33]

Sixth, TSSAA must establish the "actual" not just "stated" interest in support of its regulation of speech. That burden is not satisfied by "mere speculation or conjecture." *Edenfield*, 507 U.S. at 768, 770. "[H]ypothesized justifications" are insufficient. *Thompson*, 535 U.S. at 374.

In its deliberative process, government must have and "rely upon" some basis of evidence to support its speech-restricting regulation. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438, 442 (2002) (Government cannot "get away with shoddy data or reasoning .... [E]vidence must fairly support the ... rationale for [regulation]"). TSSAA did not establish what "actual"[34] interests underlie its "undue influence" standard, JA 479-80, and cannot support any of its asserted interests, as applied, other than by "conjecture." In adopting and retaining the recruiting rule, TSSAA did not rely on studies it performed or that others performed.[35] JA 480-85. In contrast, Brentwood has "cast direct doubt" on TSSAA's factual claims. *Alameda Books*, 535 U.S. at 438.

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[33] A "regulatory program aimed at the prevention of undue influence" risks the "danger of censorship through selective enforcement of broad prohibitions." *In re Primus*, 436 U.S. 412, 432 (1978). The First Amendment requires adequate standards for "effective judicial review." *Thomas*, 534 U.S. at 323.

[34] This is particularly true for the "competitive equity" interest, which TSSAA did not raise until the 2001 appeal. 262 F.3d at 557. The "feeder pattern" exceptions further undermine TSSAA's rationale for restricting Brentwood's speech. *See* note 12, *supra*. That under-inclusiveness calls into question whether TSSAA's asserted interests are "actual" or substantial. *City of Ladue*, 512 U.S. at 52-53.

[35] Carter was "not aware of any ... empirical research about the harms to students or their parents of athletic recruiting at the high school level." JA 485; *see also* JA 480; 13 F. Supp. 2d at 689 n.16. Concerning the subordination interest, TSSAA at first said it relied on the same evidence as its experts, but at trial admitted to the contrary and did no study of its own. CAJA 3539-40, 3535; 996-1007; JA 484-85.

Seventh, content-based restrictions are not "permissible [simply] because other avenues of expression remain open." *Meyer v. Grant*, 486 U.S. 414, 424 (1988); *Reno v. ACLU*, 521 U.S. 844, 880 (1997) (government cannot "ban leaflets" because persons "are free to publish books").

II. TSSAA Merits No Special Dispensation From Traditional First Amendment Doctrine.

What TSSAA seeks in the First Amendment context is "nothing less than a dispensation for itself," a "[p]lea[] for special treatment" for the regulation of high school athletics. 531 U.S. at 304-05. It seeks to avoid the distinction between its power to regulate *speech* and *conduct*, and proposes a drastically watered down version of First Amendment protection, akin to the protection applicable in the prison context. TSSAA seeks to expand certain accommodations this Court has made – in the context of public expenditures and public employment – by transforming them into general doctrine. This Court should reject TSSAA's plea.

A. TSSAA's Waiver Analysis Is Flawed.

At bottom, TSSAA's contract theory claims that, by signing a registration form, Brentwood has waived something. To avoid its First Amendment obligation, TSSAA relies on a one-line statement in the form: Brentwood agreed to "conduct its athletic programs for the year 1997 in accordance with the rules and decisions of the TSSAA." JA 231.

Constitutional rights can be waived, but the waiver claim here fails for both technical and doctrinal reasons.

Waiver is an affirmative defense that, along with other such defenses as "estoppel," is itself waived if not pled. Fed. R. Civ. P. 8(c). In its Answer to Brentwood's complaint, CAJA 86 (Fourth Defense), TSSAA did not plead the affirmative defense of "waiver" and cannot assert it now.

But, even if TSSAA could assert a waiver defense, it cannot prevail. To be effective, a waiver must be "voluntary, knowing, and intelligently made," an "intentional relinquishment or abandonment of a known right or privilege." This Court does not "presume acquiescence in the loss of fundamental rights." *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185-86 (1972). Thus, "in the civil no less than the criminal area, 'courts indulge every reasonable presumption against waiver.'" *Fuentes v. Shevin*, 407 U.S. 67, 95 n.31 (1972).

The starting point is the "content of the contract." A waiver must "at the very least be clear." Issues such as "involuntariness or unintelligence" do not enter the analysis "when the contractual language relied upon does not, on its face, even amount to a waiver." *Fuentes*, 407 U.S. at 95.

Brentwood agreed to abide by TSSAA's rules. As TSSAA notes, it would have no authority over Brentwood if the school did not agree to be bound by the TSSAA's rules and regulations. This agreement did no more than what TSSAA has claimed for it – it subjects Brentwood to TSSAA authority, but it does not constitute a waiver of rights. The TSSAA-drafted form contract "gives no guidance as to whether Brentwood waived a right to challenge a rule it considered unconstitutional." In the face of the presumption against waiver, the "contract's silence thus becomes evidence of an absence of waiver of constitutional rights," especially since there is "no basis for differentiating between a waiver of some rights and not others." 442 F.3d at 425. In short, nothing on the "face" of the contract "even amount[s] to a waiver." In the absence of any specific language in the contract regarding waiver of rights, TSSAA cannot meet its burden of overcoming the presumption against waiver.

In addition, there must be specificity of just what rights are being waived. In *Fuentes*, this Court refused to find waiver in a contract that allowed a seller to "take back" or "repossess" merchandise upon default, but that did not

specify waiver of any particulars, such as a hearing. Unlike the waiver in *Snepp v. United States*, 444 U.S. 507 (1980), which specified exactly what procedures would be followed if a former CIA employee sought to publish a book, the contract in *Fuentes* did not indicate "*how* or *through what process* ... the seller could take back the goods." 407 U.S. at 96 (emphasis added). The TSSAA form here says nothing about waiver or what is being waived. JA 231.

Also, waiver requires the "intentional relinquishment" of a "known" right or privilege. *Overmyer*, 405 U.S. at 186. According to TSSAA and the Sixth Circuit, TSSAA was not a state actor in 1997 under circuit precedent. Under the circumstances, it seems quite far-fetched to assert that in 1997 Brentwood "intentional[ly] relinquish[ed]" a "known" constitutional right. Absent state actor status, TSSAA is not subject to the First Amendment or due process, so Brentwood could not (under TSSAA's own theory) have "intentional[ly] relinquish[ed]" a "known" constitutional right since no such constitutional right existed.

So, on technical and doctrinal grounds, TSSAA cannot overcome the presumption against waiver.[36] There are additional, important reasons not to depart from strict waiver standards in this case.

TSSAA's waiver (and contract) arguments do not account for the First Amendment interests of students and parents, focusing only on the source of governmental regulatory power and the relationship between TSSAA and Brentwood. Robust First Amendment waiver protections are

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[36] Waiver can be appropriate, as *Snepp* shows. But the facts of *Snepp* are much different. Snepp's "trust" relationship with the CIA gave government a "compelling interest" in protecting the "secrecy of information important to our national security." 444 U.S. at 510-11 & n.3. TSSAA does not have a "trust" relationship with its members, and its punishment of speech here is not necessary to promote any interest.

critical for these third-party interests,[37] especially as students also are subject to TSSAA penalties. *See* note 5, *supra*.

B. TSSAA Penalized The Exercise of Basic Rights.

TSSAA's punishment of Brentwood for its pure speech stems from concern that the recipients of the speech will act on it. This is a "direct and specific abridgment of First Amendment rights." *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 720 (1996). Whether viewed under First Amendment analysis or unconstitutional conditions analysis, TSSAA's action fails.

Under the unconstitutional conditions doctrine, "government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected ... freedom of speech' even if he has no entitlement to that benefit." *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996). It was developed as a shield – to overcome the proposition, "rejected for decades now," that a "public employee has no right to a government job and so cannot complain that termination violates First Amendment rights." *O'Hare*, 518 U.S. at 715-16. TSSAA would turn the unconstitutional conditions doctrine from a shield that gives greater protection to constitutional claims into a sword aimed at the heart of First Amendment doctrine.

This Court has recognized that if the government "could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' Such interference with constitutional rights is impermissible." *Id.* at 716. When government directly punishes protected First Amendment

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[37] *Bellotti* (an "undue influence" case) is instructive. This Court stressed the "inherent worth" of speech, which "does not depend upon the identity of its source, whether corporation, association, union, or individual." 435 U.S. at 777.

activity, thereby penalizing it, the level of scrutiny is the same whether the right is being directly infringed or whether consequences flow from the exercise of that right.[38]

This Court has recognized government's special commonsense interests when it spends money on specific programs. If government wishes to support a program for one issue, it must be able to guard against the recipient spending the funds on something else even though this distinction is essentially content-based. Similarly, if government wishes to dissociate itself from fund recipients who discriminate on the basis of race or gender, it may do so. These funding cases are a special circumstance, and, in upholding restrictions on speech funded by government, the Court has made it clear that the entity receiving the funds does not surrender its constitutional rights at all.

Thus, this Court has long held that a "refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity." *Harris v. McRae*, 448 U.S. 297, 317 n.19 (1980). But direct state interference (as here) with a protected activity is different from a funding decision to prioritize or to disfavor a protected right. *Maher v. Roe*, 432 U.S. 464, 475 (1977).

Rust v. Sullivan, 500 U.S. 173 (1991), broke no new ground in this regard. Contrary to TSSAA's claim, *Rust* does not authorize the conditioning of a benefit upon the surrender of constitutional rights. In fact, *Rust* does no more than allow government to get what it pays for while also dissociating itself from certain disfavored private activity (as

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[38] *See, e.g., Rutan v. Republican Party*, 497 U.S. 62, 74 (1990) (When significant "penalties" are imposed "for the exercise of rights guaranteed by the First Amendment," such penalties "impermissibly encroach on First Amendment freedoms"); *Dunn v. Blumstein*, 405 U.S. 330, 341 (1972) (Interests affected by durational residency requirements for voting are "affected in different ways.... The right to travel is merely penalized, while the right to vote is absolutely denied. But these differences are irrelevant ... [since] a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution").

it does in Title VI and Title IX of the Civil Rights Act). *See Grove City College v. Bell*, 465 U.S. 555, 575-76 (1984).

In *Rust*, government funded family planning services but barred use of those funds for abortion-related services, including abortion-related speech. 500 U.S. at 196. The regulations were upheld, precisely because they did not exact a surrender of speech rights in exchange for federal funding. Government was not acting as regulator via its spending power; it did not seek to control collateral or downstream activity by recipients, so that government would be projecting its spending power in a regulatory manner.[39] On the contrary, the regulations only required that government-funded projects operate within program guidelines; grantees could seek other funding for non-guideline activities, provided that such projects were separate and distinct. By accepting federal grant funds, grantees did not surrender their constitutional rights to discuss abortion; their speech was restricted only in their use of federal grant funds, leaving a grantee "unfettered in its other activities." *Id.*

Thus, in *Rust,* government was "simply insisting that public funds be spent for the purposes for which they were authorized" and not something else. Grantees could still engage in abortion-related speech, but those activities had to be "separate and independent from the project that receives [federal] funds." *Id.* In this way, government did not impose conditions on its grants, it merely chose to fund certain programs and not other, disfavored activities, which could continue provided the government's desire to be disassociated from that activity was honored.

The essential point here is that the rules controlling government spending are different from the rules controlling other forms of government activity, such as regulation. And when government spending equates with regulation – *e.g.*,

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[39] *Cf. South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82 (1984) (government can regulate by contracting, thereby losing its dormant commerce clause exemption for market participation).

projecting its objectives beyond the scope of the grant – then this Court has viewed the exercise of governmental power in a different light. *Id.* at 199-201. *Rust* holds that, in choosing which programs to fund, government can dissociate itself from disfavored activities (even if it cannot directly punish that activity in other ways).[40] *Rust* does not support the direct punishment of speech by TSSAA in the regulatory (not funding) context of this case. *See Ibanez, supra.*

C. The Public Employee Doctrine Does Not Authorize TSSAA's Regulatory Conduct.

Relying on public employees cases, TSSAA asserts that Brentwood's pure speech is not protected because it does not involve a matter of public concern. "[W]hen the government regulates how and when citizens can enter into voluntary contractual relationships with the government that regulate certain speech by those citizens, the government's licensing or regulatory scheme must meet constitutional standards, regardless of whether the speech at issue involves a matter of public concern." 442 F.3d at 424. TSSAA contends that the "public concern" limitation it seeks – yet another special "dispensation" from standard doctrine – "can [be] readily accommodate[d] [to] this case." Pet. Br. 27. This is a polite concession that the doctrine it advocates is not supported by any decision of this Court. TSSAA seeks to make new law and in the process water down First Amendment protections that attach to any party who voluntarily accepts what TSSAA describes as a governmental benefit.

Again, TSSAA's position is ahistorical. The public employment context begins with the anachronistic Holmes aphorism that public employees enjoy no First Amendment protection, which this Court has "rejected for decades now." *O'Hare*, 518 U.S. at 716-17. Over time, this Court has

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[40] *See United States v. Am. Library Ass'n, Inc.*, 539 U.S. at 211 (2003).

expanded First Amendment protections for public employees, recognizing certain interests but also retaining important prerogatives of government as employer.

While the "government employment cases" require "sensitivity to governmental needs," this Court has warned that "First Amendment rights must not be neglected." *Umbehr*, 518 U.S. at 678. The cases balance the particularized interests of government as employer with the speech interests of employees who speak out as citizens. TSSAA would take a carefully constructed and cabined doctrine – designed to address essentially inside information about the internal operation of government – and give it general application, adapting it to a regulatory setting to which it is ill suited.

The deferential standard applied to public employee speech does not merely result from the contractual relationship between employees and government (or between service-provider contractors and government) but from the special nature of that relationship and the government's interest in performing its role as provider of government services. *Umbehr*, 518 U.S. at 674.

The special circumstances of public employment recognize that "[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions." *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1958 (2006). No such generalized interest exists in every case in which government forms a contractual relationship. Those who subject themselves voluntarily to government's regulatory authority (or to other contractual relationships) are not functional equivalents of employees.

No such government interest exists here. Brentwood was punished for communicating to its incoming students about an activity TSSAA had approved, not about internal personnel matters at TSSAA. TSSAA's relationship with Carter is altogether different from its relationship with Brentwood. Thus, in the regulatory context, Ms. Ibanez did

not speak on a matter of public concern when she provided information on her letterhead, yet her commercial speech was protected under traditional commercial speech doctrine.[41] And the musical "Hair" was not speech on a matter of public concern but received full, traditional First Amendment protection from government's restraint even though the city was leasing out a city-run theatre (non-sovereign authority).

The implications of a diluted First Amendment are significant. Government contracting is pervasive, and TSSAA's approach would give government a powerful lever of control over the affairs of vast numbers of people (*e.g.*, public beneficiaries) and institutions (*e.g.*, universities). Neither TSSAA nor its friends has carefully explained why the context here – regulation of high school athletics – calls for such a substantial limitation on a private party's ability to speak freely. As the Sixth Circuit properly held, government's interest is reflected in the substantiality of the objectives it pursues and the fit between those objectives and the restraint on speech – not in the private or public subject matter of the speech.

In the public employment context, government limits the speech of and disciplines public employees (and functionally equivalent private contractors). By contrast, government here punishes a private school and harms students and parents who want to receive information from the school. The speech restriction is imposed not *by* a school (an area of education with some deference) but by a government regulator *against* a school – an area in which comparable deference is unwarranted.

D. TSSAA Cannot Define Away Brentwood's First Amendment Rights.

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[41] Indeed, it is hard to see how most commercial speech in the professional discipline context would qualify as a matter of "public concern" if TSSAA has its way. *See Ibanez, supra.*

TSSAA would adulterate traditional First Amendment protections by defining its regulatory program to preclude Brentwood's speech. Pet. Br. 22-25. While government can broadly define a program's scope, even that authority is not unlimited.[42] In the regulatory setting, this power is much more constrained. The unconstitutional conditions doctrine is a response to the overreaching definitionalist approach, which can render constitutional safeguards nugatory. *Cf. Palazzolo v. Rhode Island*, 533 U.S. 606, 626-27 (2001) (limiting government's ability to define away property rights); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) ("[A] State, by *ipse dixit*, may not transform private property into public property").

For both procedural due process and the First Amendment, TSSAA claims its regulations define Brentwood's rights, and Brentwood must take the bitter with the sweet. This "bitter with the sweet" approach was specifically and definitively rejected in *Loudermill*, 470 U.S. at 541, in which this Court held that a state can define an entitlement but, once it does, the procedural protections arise from the due process clause itself. Procedural due process rights cannot be defined away.

Bellotti is an example in the First Amendment context. The state argued that corporations are "creatures of the state" and "have only those rights granted to them by the State." This Court rejected the contention that states "are free to define the rights of their creatures without constitutional limit," characterizing such claims as "an extreme position" because it would allow states to deny corporations "the protection of all constitutional guarantees." 435 U.S. at 778 n.14. In providing for the corporate form, states offer a benefit; firms voluntarily choose to accept those benefits and

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[42] *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 547 (2001) ("Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise").

agree to comply with the requirements. But the voluntary acceptance of the corporate form does not allow states to circumvent traditional First Amendment protections through definitionalism. That "extreme position" was rejected because of its consequences for free expression.

Similarly, commercial speech cases such as *Ibanez* cannot be squared with a definitionalist approach. A government regulator cannot simply define a profession as excluding commercial speech (advertising). This Court's expanded protection of commercial speech in the professional context is incompatible with TSSAA's position – that government can circumvent First Amendment protections by defining its regulatory objectives so as to preclude the exercise of commercial speech rights.

In sum, TSSAA's definitionalist contention is just another unpersuasive obfuscation. As the Sixth Circuit held, TSSAA is acting in a conventional regulatory capacity, and the *source* of its regulatory authority is not determinative of the proper analytical framework. The absence of harm, the absence of evidence of subordination of academics to athletics, and the utter failure to establish either the substantiality of the competitive equity interest or how it is advanced here make this a strong case to affirm on the facts. This case is not a good vehicle for developing nuances of contract/waiver or unconstitutional conditions doctrine.

III. The Recruiting Rule Is Open To Facial Challenge.

In 2001, the Sixth Circuit applied the "no set of circumstances" standard from *United States v. Salerno*, 481 U.S. 739, 745 (1987), to reject Brentwood's facial challenge. Accordingly, the case has proceeded on an as applied basis, "focused on the two alleged recruiting rule violations in question rather than engag[ing] in a wide-ranging attack or defense of the recruiting rule as a whole." 262 F.3d at 558. Misconstruing this Court's "as applied" decisions, TSSAA wants to defend the recruiting rule by resort to the generalized concern about "athletic recruiting," while not allowing this Court to "focus[] on the narrow facts of this case." Pet. Br. 37. TSSAA cannot have it both ways.

The speech punished in this case is non-commercial in character. 262 F.3d at 555. When government punishes specific non-commercial speech under a discretionary "undue influence" standard, this Court analyzes the specific context and the specific speech in question; in the absence of a showing of harm under the particular circumstances, government cannot "justify proscription of the activity," even if "part of a regulatory program aimed at the prevention of undue influence." *In re Primus*, 436 U.S. at 432, 436. In *Primus*, this Court found that no "undue influence, overreaching, misrepresentation, or invasion of privacy actually occurred" and invalidated the punishment (public reprimand). *Id.* at 434-35. Even if Brentwood's speech were solicitation, government cannot discipline non-commercial solicitation "without proof of actual wrongdoing that the State constitutionally may proscribe." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 462 n.20 (1978).

The findings here are similar to those in *Primus*; the lower courts found the SPL and calls to be informative, not harmful, with no indication of exploitation "in theory or fact." 442 F.3d at 428. TSSAA applies the "undue influence" principle on an *ad hoc*, case-by-case basis – in this case to pure speech. As the facts developed, the

recruiting rule does not contemplate a broad prophylactic or categorical ban on all school-initiated, targeted contact. So, TSSAA's assertion that the rule should be viewed in the abstract, not as applied in specific situations, rings peculiarly hollow.[43] Since there is no *per se* categorical "coach contact" or "initial contact" rule, but only an *ad hoc* case-specific "undue influence" rule applied to specific speech or conduct, TSSAA cannot claim that the specific application of the rule need not be justified. Since there is no categorical rule, there is no way to evaluate the application of the rule except by examining its application in specific cases and contexts. *Primus* makes this clear. Otherwise, government would be handed a blank check to restrict speech, without effective judicial review.

This Court's recent unanimous decision in *Wisconsin Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006), demonstrates the vitality of the *Primus* principle. Although the federal campaign finance law had been upheld against facial attack, this Court expressly allowed an as applied claim to proceed, addressing the constitutionality of applying the general campaign finance law to "several [specific] broadcast advertisements . . . intended to run during the 2004 election." This ruling is not compatible with TSSAA's assertion that it is error to "focus[] on the narrow facts of this case." *See Randall v. Sorrell*, 126 S. Ct. 2479, 2491-92 (2006) (contemplating as applied challenge in specific factual circumstances); *City of Littleton v. Z. J. Gifts D-4, L.L.C*, 541 U.S. 774, 783-84 (2004) (upholding general judicial review for a "simple objective" set of licensing criteria, but allowing as applied challenges in specific cases of censorship or

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[43] For example, it is one thing to uphold a bright-line rule such as a 100 foot campaign free zone around election booths, but quite another to say that a law preventing campaigning so close to an election booth as to constitute "undue influence" on voters cannot be challenged as applied to an interpretation that "undue influence" means a distance of two miles from the election booth. *Cf. Burson v. Freeman*, 504 U.S. 191 (1992).

undue delay). Nor is it compatible with attorney discipline commercial speech cases, such as *Ibanez*, which focus on the application of subjective criteria to specific circumstances.[44]

If TSSAA can sidestep the as applied challenge simply by downplaying or ignoring the specific evidence at trial, then Brentwood should be permitted to reassert its facial challenge.

A facial challenge is permissible here for two reasons. First, in applying the *Salerno* standard to the First Amendment context, the Sixth Circuit erred. Decisions of this Court since 2001 have made clear that the facial challenge standard for First Amendment cases is not that of *Salerno* but rather whether a regulation affecting speech "prohibits a substantial amount of protected expression," whether it "abridges the freedom to engage in a substantial amount of lawful speech." *Ashcroft,* 535 U.S. at 244, 256; s*ee also Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003) ("[T]hat a law punishes a 'substantial amount of protected free speech ... suffices to invalidate *all* enforcement of that law"); *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Stratton*, 536 U.S. 150, 160 n.9 (2002) (facial challenge standard is whether regulation of expression "abridges so much protected speech that it is invalid on its face").

Second, evidence at trial demonstrated that TSSAA interprets the "undue influence" provision under a highly discretionary, standardless totality-of-circumstances test. Facial First Amendment challenges of excessive discretion are permitted because of the risk of self-censorship, an "evil[] ... that can be effectively alleviated only through a facial challenge.... Self-censorship is immune to an 'as applied' challenge, for it derives from the individual's own actions, not an abuse of government power." *Lakewood*, 486 U.S. at 757; s*ee Forsyth County*, 505 U.S. at 133 & n.10.

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[44] Even a categorical rule must be justified in an as-applied TPM context by reference to the specific circumstances. *City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 808-10 (1984); *see also* BIO 26-27.

The evidence demonstrates the excessive discretion that TSSAA retains. By any fair measure, application of the recruiting rule results in restriction of a "substantial" amount of First Amendment protected speech. Brentwood and other private schools cannot proactively pursue interests in diversity or generally tell their story; families are inhibited from receiving targeted information from schools about program activities. School-choice experts strongly supported the need for proactive targeted communication to attract students from lower socioeconomic levels and the lack of harm therefrom.[45] JA 305-07, 310-11, 354-57, 359-60.

IV. TSSAA Violated Procedural Due Process.

Whatever is required by TSSAA's by-laws is immaterial in light of *Loudermill*, 470 U.S. at 541, which holds that procedural protections of entitlements flow from the due process clause itself. And, while waiver of rights can occur, there was no such waiver here for the reasons explained earlier. *See* Section II.A, *supra.* Because Brentwood did not surrender its due process rights in joining TSSAA, the only issue is what process is due. *Mathews*, 424 U.S. at 334-35. This requires sensitive balancing to determine what procedural safeguards are required in particular circumstances. This case involves a punishment for pure speech, in which procedural safeguards are a traditional bulwark of First Amendment protections and impose on government the burden of justification. Here, TSSAA never provided Brentwood with evidence supporting its penalties. Brentwood had the burden throughout to demonstrate its innocence. JA 395, 401; Tr. 1497-98.

This Court has found that one of the "principles [that] have remained relatively immutable in our jurisprudence" is that where the reasonableness of state action depends on

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[45] This Court's charitable solicitation cases provide further support for a successful facial challenge here. *E.g.*, *Village of Schaumburg v. Citizens for Better Env't*, 444 U.S. 620 (1980); *Watchtower*, *supra.*

factual findings, "the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue." *Greene v. McElroy*, 360 U.S. 474, 496 (1959). In *Loudermill*, 470 U.S. at 546, the Court held that, at pre-determination, due process required notice of charges, "an explanation of the employer's evidence, and an opportunity to present [one's] side of the story." *Loudermill* also made clear that more robust post-determination procedures pertain, and "the existence of post-termination procedures is relevant to the necessary scope of pre-termination procedures."[46] *Id.* at 547 n.12. Thus, the limited pre-determination procedures required in *Loudermill*, which were not even present here, do not establish the total scope of process required by due process. Before the punishment became final, Brentwood was entitled to know with particularity what issues were still alive, what evidence TSSAA had and was relying on, and to have an opportunity to respond to issues and evidence "before the penalties are imposed." 442 F.3d at 437. This is what the lower courts held; it is not very burdensome.

The district court found that the "TSSAA Board of Control considered *ex parte*, post-hearing evidence during its private deliberations, to which Brentwood ... had no right of reply." 304 F. Supp. 2d at 1003. That is, the Board "received, considered, and relied upon *ex parte* statements and documentary evidence from Defendant Carter and two TSSAA employees who investigated the allegations against Brentwood." *Id.*; *see also* JA 467-69; 475-76; Tr. 1848-1908. And, Brentwood "had no opportunity to reply to this *ex parte* evidence or even hear it and was prejudiced by the evidence and the private post-hearing process" because the Board considered this evidence in determining the penalty

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[46] Since TSSAA's initial sanctions were effective immediately, the subsequent proceedings are properly considered post-determination, but, as the district court found, the TSSAA procedures do not even satisfy the more modest pre-determination requirements. 304 F. Supp. 2d at 1005.

against Brentwood. 304 F. Supp. 2d at 1003. Further, TSSAA's investigative notes were not made available to Brentwood. *Id.* at 1004-05; JA 393-403; 467-68; 475-76. During this executive session, the conduct of Bart King was discussed, and the district court found that "King was a factor in the penalties imposed," 304 F. Supp. 2d at 1004, even though "[t]here was no indication from the TSSAA before the final hearing ... that [it] was still considering the Bart King allegations."[47] *Id.* at 1004 n.29.

Based on these factual findings, the district court held due process is not satisfied because Brentwood was "not informed of the evidence considered by the decision-maker."[48] *Id.* at 1005. Applying *Mathews*, the district court held that "requiring the TSSAA to present its evidence of a rules violation in the presence of the school alleged to have committed the violation is a fundamental procedural safeguard that would have imposed no, or a very modest, additional administrative burden on the organization, and would have 'contributed substantially to the making of a rational decision.'" *Id.* at 1006. This was particularly true in light of the factfinding that the ex parte, post-hearing evidence was "prejudicial to Brentwood." *Id.* Board of Control President Mike Reed openly testified that "[Bart King] was a factor in the overall penalty." JA 385-86.

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[47] While TSSAA initially indicated that Bart King was of concern, the July 29 violations letter made no mention of King. JA 238-44. Indeed, Carter testified that, as of July 29, King was no longer an issue: "He was out of the picture in terms of, I think, any disciplinary action on our part based on Mr. King." CAJA 756. TSSAA never provided any factual basis for the King allegations and refused to identify whether the withheld evidence even related to King. CAJA 2630. In fact, Carter flatly rejected Brentwood's offer to present Bart King in order to clarify his relationship with the school. JA 267, 300. Thus, the district court finding that Brentwood was "misled" about King's relevance and "denied an opportunity to defend this allegation head on," is fully supported by the record. 304 F. Supp. 2d at 1004 n.29; 442 F.3d at 435 n.20.

[48] In fact, Childress recalled Brentwood "literally pleading" for specific information on the allegations made against the school. JA 467-68.

Upon review, the Sixth Circuit affirmed, holding that due process requires "that a school be informed of all of the issues relied on by [TSSAA]" before it finally levies a penalty, that Brentwood get "notice of the evidence relied upon [by TSSAA] in penalizing Brentwood," and that Brentwood have "a chance to respond to" TSSAA's "issues" and to its "evidence" before penalties were finally imposed. 442 F.3d at 437-38. In particular, "TSSAA failed to give ... notice as it related to King," so Brentwood "had no notice that it should respond to the King evidence," yet the "King evidence was used by the TSSAA in its deliberations" and "influenced the penalties imposed." *Id.* Again, the record supports this conclusion. *See* note 47, *supra*.

These requirements are fully consistent with this Court's due process decisions. As this Court recently held, "notice of the factual basis" of government's adverse decision and a "fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker" are critical elements of due process. *Hamdi*, 542 U.S. at 533 (relying on *Loudermill*). The lower courts appropriately balanced the factors under *Mathews* and reached the correct outcome.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Sixth Circuit.

Respectfully submitted,

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APPENDIX

To: Brentwood Academy
From: Joe Marley
Date: 1/21/97

It is our intention for Ray Marley to attend Brentwood Academy in the 1997-98 school year. Ray has my consent to participate in a speed and strength program at Brentwood Academy.

Joe Marley
/s/ Joe Marley

BRENTWOOD ACADEMY
219 Granny White Pike
Brentwood, Tennessee 37027
(615) 377-3632
fax: (615) 377-3709

Athletic Director: Carlton Flatt
Asst. Athletic Director: Buddy Alexander

April 23, 1997

Having officially enrolled at Brentwood Academy, the TSSAA allows you to participate in spring football practice. If you are not currently involved in a sport at your school, we would like to invite you to practice with your new team. Equipment will be given out April 30th at 3:30 downstairs in the locker room.

Spring practice will begin May 1, 1997 and conclude on May 14, 1997. Practice begins at 3:20 and will be finished by 4:45. Due to the inconvenience to your parents, please do not feel that you must attend every practice. However, I do feel that getting involved as soon as possible would definitely be to your advantage.

In the near future, you will receive a letter outlining our summer workout program. If you have any questions, please call me at school 373-0611 x 119, or at home 373-0475. We are certainly glad that you decided to become an ***Eagle***.

Your Coach,
Carlton Flatt

700c

No. 06-427

In the Supreme Court of the United States

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION, PETITIONER

v.

BRENTWOOD ACADEMY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

The United States will address the following question:

To what extent does the First Amendment limit the government's ability to place restrictions on the speech of individuals or entities that voluntarily participate in a program administered by the government or enter into a contractual relationship with the government?

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TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION, PETITIONER

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case concerns the extent to which the First Amendment limits the government's ability to place restrictions on the speech of individuals or entities that voluntarily participate in a program administered by the government or enter into a contractual relationship with the government. The federal government routinely imposes restrictions on speech in those and similar contexts (for example, when it acts as property owner, educator, employer, or funder). When it does so, the government acts in a capacity other than its sovereign capacity with respect to the public at large and, as a result, a different and more deferential First Amendment inquiry governs. The First Amendment analysis employed by the court of appeals in this case overlooks that distinction and thus may affect the federal government's ability to

take permissible action in a variety of contexts. The United States therefore has a significant interest in this case.

The United States has participated as a party or amicus curiae in numerous other cases involving the application of the First Amendment when entities or individuals participate in a government program, or enter into a contractual relationship, that places restrictions on their speech, including cases addressed by the court of appeals and relied upon by petitioner here. See, *e.g.*, *Garcetti* v. *Ceballos*, 126 S. Ct. 1951 (2006); *Rumsfeld* v. *FAIR*, 126 S. Ct. 1297 (2006); *Board of County Comm'rs* v. *Umbehr*, 518 U.S. 668 (1996); *Rust* v. *Sullivan*, 500 U.S. 173 (1991); *Cornelius* v. *NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788 (1985); *Grove City Coll.* v. *Bell*, 465 U.S. 555 (1984); *Snepp* v. *United States*, 444 U.S. 507 (1980) (per curiam). The United States participated as amicus curiae at an earlier stage of this case on the state-action question.

STATEMENT

1. Petitioner Tennessee Secondary School Athletic Association (TSSAA) is a non-profit corporation that regulates interscholastic athletic competition among high schools in Tennessee. It is made up of 55 private schools, including respondent Brentwood Academy (Brentwood), and 290 public schools. TSSAA is governed by a legislative council, which has authority to enact regulations, and the board of control, which has authority to enforce them. This case involves one such regulation, the so-called "recruiting rule." The rule prohibits TSSAA members from using "undue influence * * * to secure or to retain a student for athletic purposes," and a non-binding interpretive commentary to the rule prohibits a coach from contacting a student or his or her parents before the student has enrolled in the school. *Brentwood Acad.* v. *TSSAA*, 531 U.S. 288, 291-293 (2001) (*Brentwood I*); Pet. App. 79a-81a; J.A. 134-139, 181-185, 274.

In the Spring of 1997, Brentwood's athletic director and football coach, Carlton Flatt, sent a letter to the families of eighth-grade boys who had signed enrollment contracts with Brentwood, but had not yet enrolled in the school, inviting the boys to participate in spring football practice. In follow-up telephone calls to the families, Flatt clarified that attendance at the practices was not mandatory. TSSAA's executive director, Ronnie Carter, notified Brentwood that those actions violated the recruiting rule and that certain other actions by the school, which are not at issue here, also violated TSSAA rules. Brentwood requested and received a hearing before Carter and members of the board of control, and then appealed to the full board. The challenges were unsuccessful, however, and the board of control penalized Brentwood for its rules violations by placing Brentwood's athletic program on probation for four years, declaring its football and boys' basketball teams ineligible for the playoffs for two years, and imposing a fine of $3000. *Brentwood I*, 531 U.S. at 293; Pet. App. 83a-86a & n.1; J.A. 119, 238-271, 275-276.

Brentwood then sued TSSAA and Carter in federal court. It alleged that, in enforcing its rules against Brentwood, TSSAA violated the First Amendment and other provisions of federal and state law. *Brentwood I*, 531 U.S. at 293; Pet. App. 86a.

2. The district court granted partial summary judgment for Brentwood. *Brentwood Acad.* v. *TSSAA*, 13 F. Supp. 2d 670 (M.D. Tenn. 1998). It held that TSSAA is a state actor subject to constitutional limitations, *id.* at 679-685, and that TSSAA's recruiting rule violates the First Amendment, both on its face and as applied, *id.* at 686-694. In finding a First Amendment violation, the court reasoned that the recruiting rule is a "content-based" regulation subject to the "most exacting scrutiny" and that TSSAA could not show that the rule serves a "compelling governmental interest" and is the "least

restrictive means" of furthering it. *Id.* at 687-691 (quoting *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 642 (1994)). The court of appeals reversed, holding that TSSAA is not a state actor. *Brentwood Acad.* v. *TSSAA*, 180 F.3d 758 (6th Cir. 1999). This Court granted certiorari, 528 U.S. 1153 (2000), and reversed the decision of the court of appeals, *Brentwood I*. The Court held that "[TSSAA's] regulatory activity may and should be treated as state action owing to the pervasive entwinement of state school officials in the structure of the association." 531 U.S. at 291.

On remand from this Court, the court of appeals again reversed the partial summary judgment for Brentwood, this time holding that the district court applied the wrong standard in finding a violation of the First Amendment. Pet. App. 1a-24a. The court of appeals held that the recruiting rule is a "content-neutral regulation" that restricts the "time, place, and manner of speech," and is therefore subject to "intermediate scrutiny." *Id.* at 14a-15a. Under that standard, the court explained, TSSAA must show that the rule promotes "substantial governmental interests" and is "narrowly tailored" to serve them. *Id.* at 21. The court of appeals remanded the case to the district court for a determination of whether those showings could be made. *Id.* at 23a. This Court denied certiorari. 535 U.S. 971 (2002).

3. On remand from the court of appeals, the district court held a bench trial, at the conclusion of which it found that the recruiting rule, as applied to Brentwood, violated the First Amendment. Pet. App. 27a-55a. The court found that the rule furthered two substantial governmental interests: keeping high school athletics subordinate to academics and protecting student athletes from exploitation. *Id.* at 48a-49a. The court held, however, that the application of the rule to Brentwood was not narrowly tailored to further those interests, because, in the court's view, Flatt's letter and follow-up

phone calls did not elevate athletics over academics or exploit students or their parents. *Id.* at 49a-55a.[1]

4. On the parties' cross-appeals, a divided court of appeals affirmed in relevant part. Pet. App. 78a-153a.

a. As an initial matter, the majority rejected TSSAA's contention that the district court should have reviewed the challenged actions more deferentially because TSSAA acts in a contractual rather than sovereign capacity with respect to Brentwood and other member schools. Pet. App. 88a-96a. The majority reasoned that TSSAA's proposed approach was inconsistent with the analytical framework described in the court of appeals' opinion on remand from this Court, *id.* at 88a-91a, and that, in any event, the cases on which TSSAA relied involved situations in which (unlike in this case) the restriction on speech was imposed upon a government employee, an independent contractor, or a recipient of public funds, *id.* at 91a-95a (discussing *Pickering* v. *Board of Educ.*, 391 U.S. 563 (1968), *Board of County Comm'rs* v. *Umbehr*, 518 U.S. 668 (1996), and *Rust* v. *Sullivan*, 500 U.S. 173 (1991)). Applying intermediate scrutiny, the court of appeals majority then affirmed the district court's First Amendment holding. *Id.* at 96a-107a.

TSSAA had proffered three interests as justification for its recruiting rule: keeping high school athletics subordinate to academics; protecting student athletes from exploitation; and fostering a level playing field among member schools. Pet. App. 97a. The majority held that the court of appeals had already recognized, in its decision on remand from this Court, that the first interest was substantial; that TSSAA had presented "voluminous evidence at trial" that the second interest

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[1] The district court also ruled, *inter alia*, that, in enforcing the recruiting rule, TSSAA violated Brentwood's substantive due process and procedural due process rights. Pet. App. 55a-71a.

was substantial; but that TSSAA had presented "no evidence" that the third interest was substantial. *Id.* at 97a-100a.

Having held that only the first two proffered governmental interests were substantial, the majority then held that the recruiting rule, as applied to Brentwood's specific conduct, was not narrowly tailored to further those interests. Pet. App. 100a-107a. The majority believed that the penalties imposed on Brentwood did not further the goal of protecting student athletes from exploitation, because all the eighth graders who were contacted by letter and telephone had agreed to attend Brentwood and were informed that attendance at spring practice was optional. *Id.* at 102a-103a. The majority also believed that the penalties did not further the goal of keeping high school athletics subordinate to academics, because, in addition to the information about spring football practice, Brentwood had provided incoming students with a variety of information about academics and other activities. *Id.* at 103a-106a.[2]

b. Judge Rogers dissented in relevant part. Pet. App. 131a-147a. In his view, Brentwood waived its right to engage in the speech at issue in exchange for membership in TSSAA and the waiver was not an "unconstitutional condition" of membership, because it was related to Brentwood's participation in the athletic association and did not extend to speech on a matter of public concern. *Id.* at 133a-139a. That theory had not been addressed in the court of appeals' opinion on remand from this Court and thus, the dissent believed, it was not foreclosed by the earlier opinion. *Id.* at 139a-140a. Judge Rogers also believed that the recruiting rule was narrowly tailored to further substantial governmental interests and that there was therefore no First Amendment violation even under the stan-

[2] The court of appeals majority also affirmed the district court's procedural due process holding, but it reversed the district court's substantive due process holding. Pet. App. 108a-120a.

dard applied by the court of appeals majority. *Id.* at 140a-147a. In the dissent's view, "TSSAA is not required to demonstrate that each time it enforces the anti-recruiting rule[] it is stamping out the exploitation of student athletes or the bending of academics to the will of athletics"; it is sufficient that, "in the aggregate," the conduct prohibited by the rule has "the potential" to have such an effect. *Id.* at 144a.

SUMMARY OF ARGUMENT

The court of appeals fundamentally misconceived and misapplied the First Amendment principles that control when the government restricts the speech of those who participate in a voluntary government program or enter into a contractual relationship with the government.

A. The court of appeals erred in applying a standard of "intermediate scrutiny" in reviewing the restriction on speech at issue here. That standard applies when the government acts in its traditional sovereign capacity, regulating the speech of the citizenry at large. Because TSSAA does not act in that capacity, Brentwood's challenge to the recruiting rule should have been reviewed under the substantially more deferential standard applicable when the government acts with respect to those who choose to participate in government programs or to contract with the government. When reviewed in that light, the restriction at issue is plainly constitutional.

The schools that have joined TSSAA have done so voluntarily, to obtain the benefits that membership provides, including access to athletic leagues. Under this Court's decisions, TSSAA is permitted to place restrictions on the speech of program participants, as long as the restrictions are reasonable in light of the program's purposes. See, *e.g.*, *Rust* v. *Sullivan*, 500 U.S. 173 (1991); *Cornelius* v. *NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788 (1985). The recruiting rule easily satisfies that standard. Prohibiting "undue influence"

in recruiting, including a coach's contact with students not enrolled at the school, furthers TSSAA's legitimate goals of keeping athletics subordinate to academics, preventing the exploitation of student athletes, and fostering a level playing field among member schools.

If Brentwood's challenge to the recruiting rule is not reviewed under a reasonableness standard, it should at most be reviewed using the balancing test of *Pickering* v. *Board of Education*, 391 U.S. 563 (1968). That test applies when the government restricts the speech of an independent contractor. *Board of County Comm'rs* v. *Umbehr*, 518 U.S. 668, 676 (1996). Because the relationship between TSSAA and its member schools is likewise contractual, the *Pickering* test represents the most demanding standard that could be rationally applied in this context. Under that test, the interests of the contractor "as a citizen, in commenting upon matters of public concern," are balanced against the interests of the State "in promoting the efficiency of the public services it performs." *Umbehr*, 518 U.S. at 676 (quoting *Pickering*, 391 U.S. at 568). Brentwood cannot establish a First Amendment violation under that standard, because its recruiting does not involve speech by a citizen on a matter of public concern and because, even if it did, Brentwood's interest in recruiting players for its teams would be outweighed by the TSSAA interests described above.

B. Not only did the court of appeals err in adopting a standard of "intermediate scrutiny," but it also misapplied that standard in two different ways. First, the court erred in requiring record "evidence" to establish that TSSAA's interest in competitive equity is "substantial." This Court's decisions make clear that the substantiality of a governmental interest is often a matter of judgment and common sense rather than evidence, see, *e.g.*, *Ward* v. *Rock Against Racism*, 491 U.S. 781, 796 (1989); *City Council* v. *Taxpayers for Vin-*

cent, 466 U.S. 789, 808 (1984); *Heffron* v. *International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 652-653 (1981), and that is true of competitive equity in high school athletics. Second, the court erred in concluding that Brentwood's as-applied challenge required TSSAA to justify its recruiting rule, not just as an appropriate "time, place, or manner" restriction, but as fully serving all the rule's purposes in this particular application. That is not TSSAA's burden. TSSAA is "entitled to protect its interest[s]" by applying the rule to "the general circumstances" of recruiting, and the rule need not fully vindicate all its underlying purposes in every application. *United States* v. *Edge Broad. Co.*, 509 U.S. 418, 431 (1993).

ARGUMENT

THE COURT OF APPEALS MISCONSTRUED AND MISAPLIED THE FIRST AMENDMENT PRINCIPLES GOVERNING STATE ACTION IN THIS CONTEXT

In deciding Brentwood's First Amendment claim, the court of appeals applied a standard of "intermediate scrutiny," which is applicable to a "content-neutral" regulation of the "time, place, or manner" of speech. Pet. App. 96a-97a. That standard is out of place here, because it presumes that the State is regulating the citizenry at large in its sovereign capacity, rather than regulating those—like Brentwood—that voluntarily participate in a government program or contract with the government. The restriction on speech at issue is not aimed at the public at large, but only at those schools that choose to join TSSAA. The correct First Amendment standard is thus substantially more deferential, and it is easily satisfied here. Even under the heightened "intermediate scrutiny" standard applied by the court of appeals, however, there was no violation of Brentwood's First Amendment rights. In holding otherwise, the court of appeals misapplied

the law governing conventional "time, place, or manner" restrictions.

A. TSSAA's Recruiting Rule Should Have Been Reviewed And Upheld Under The Deferential Standard Applicable To Program Participants Or Contractors

TSSAA, a state actor by virtue of this Court's decision in *Brentwood I*, regulates athletic competition among high schools that choose to become members of the association. To further its goals, TSSAA has placed certain restrictions on the speech in which member schools (and their employees and students) may engage, including the prohibition on the use of "undue influence" in recruiting at issue here. No precedent of this Court directly addresses the degree of scrutiny to which restrictions on speech should be subjected in this precise context. Established First Amendment principles point to the conclusion, however, that the restrictions should be reviewed deferentially.

Under this Court's First Amendment jurisprudence, "the role of government as sovereign is subject to more stringent limitations than is the role of government as employer, property owner, or educator." *Board of Educ.* v. *Pico*, 457 U.S. 853, 920 (1982) (Rehnquist, J., dissenting). The same is true when the government acts in other non-sovereign capacities, such as contractor, funder, or program administrator.

For example, "[i]t is a long-settled principle that governmental actions are subject to a lower level of First Amendment scrutiny when 'the governmental function operating . . . [is] not the power to regulate or license, as lawmaker, . . . but, rather, as proprietor, to manage [its] internal operation[s].'" *United States* v. *Kokinda*, 497 U.S. 720, 725 (1990) (plurality opinion) (quoting *Cafeteria & Rest. Workers* v. *McElroy*, 367 U.S. 886, 896 (1961)) (brackets in original); accord *International Soc'y for Krishna Consciousness, Inc.*

v. *Lee*, 505 U.S. 672, 678 (1992). This Court has also recognized that the government has "a freer hand in regulating the speech of its employees than it has in regulating the speech of the public at large." *Waters* v. *Churchill*, 511 U.S. 661, 671 (1994) (plurality opinion); accord, *e.g.*, *Snepp* v. *United States*, 444 U.S. 507, 509 n.3 (1980) (per curiam). Likewise, whereas a strong justification is ordinarily required when the government "exercise[s] sovereign power against * * * a citizen in response to his * * * speech," deference is due to the government's "reasonable assessments of its interests" when it "exercise[s] contractual power." *Board of County Comm'rs* v. *Umbehr*, 518 U.S. 668, 678 (1996). Finally, the government is permitted to "allocate * * * funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake." *NEA* v. *Finley*, 524 U.S. 569, 587-588 (1998).

In subjecting the speech at issue here to "intermediate scrutiny," the court of appeals did not quarrel with the proposition that restrictions on speech are generally reviewed deferentially when the government does not act in a sovereign capacity. Instead, the court concluded that TSSAA *does* act in a sovereign capacity, because, as the court of appeals put it, TSSAA functions as a "regulator." Pet. App. 94a-95a. That conclusion is mistaken. To the extent that TSSAA exercises "regulatory authority" (*id.* at 89a), it does so only over the schools that have voluntarily chosen to become members of the association; it exercises no authority over the general public. TSSAA's "regulation" of member schools is no more an exercise of sovereign authority than a government employer's "regulation" of its employees, and the latter, as the court of appeals recognized (*id.* at 95a), is indisputably *not* an exercise of sovereign authority. See, *e.g.*, *United States* v. *National Treasury Employees Union*, 513 U.S. 454, 475 (1995) (distinguishing between government's "regulation" of

"expressive activity" of federal employees and government's "direct regulation" of "communication by private entities"); *Waters*, 511 U.S. at 671 (plurality opinion) (distinguishing between "regulating the speech of [government] employees" and "regulating the speech of the public at large"). The court of appeals was also mistaken in its belief that TSSAA's recruiting rule is "analogous" to "zoning ordinances and limitations on noise, posting of signs, and distribution of religious literature." Pet. App. 89a. Those are classic sovereign functions, reflecting the exercise of regulatory authority over the citizenry at large.[3]

If Tennessee or one of its agencies had enacted a statute or regulation that barred all private high schools in the State (and their agents) from exercising "undue influence" in recruiting student athletes, on pain of fine or imprisonment, the law would be subject to the more rigorous First Amendment scrutiny reserved for restrictions aimed at the public at large—although even then, depending on the precise nature of the law, it might be more properly analyzed as a regulation of conduct that incidentally takes the form of speech (such as a prohibition on insider trading or antitrust conspiracies) than as a restriction on speech as such. But, in any event, that is not the situation here. The recruiting rule applies only to schools that choose to obtain the benefits provided by TSSAA by becoming members of the association, and compliance with the rule is merely a condition of membership. The relationship between Brentwood and TSSAA, therefore, is not the relationship between citizen and sovereign. Although the

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[3] The court of appeals also believed that the applicability of the "intermediate scrutiny" standard was the law of the case, because that standard had been adopted in the court of appeals' decision on remand from this Court. Pet. App. 88a-91a. But "a court of appeals' adherence to the law of the case" obviously "cannot insulate an issue from this Court's review." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988).

arrangement is in some respects *sui generis*, it is best understood as the relationship between program participant and program administrator or between parties to a contract. Under either view, the restrictions that TSSAA has placed on the speech of member schools must be reviewed deferentially, and the restriction at issue here does not offend the First Amendment.

1. Brentwood is a voluntary participant in a program administered by TSSAA

a. TSSAA administers a program in which member schools voluntarily participate, so as to obtain the benefits provided by the program, including access to athletic leagues. See *Brentwood I*, 531 U.S. at 291; Pet. App. 79a. This Court's cases teach that, unlike laws that regulate the public at large, rules that govern a voluntary program that provides participants certain advantages subject to certain conditions may limit the speech of participants, as long as the rules are reasonable in light of the program's purposes.

In *Cornelius* v. *NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788 (1985), for example, the Court held that the government did not violate the First Amendment by excluding legal-defense and political-advocacy organizations from participation in the Combined Federal Campaign (CFC), a charity drive directed at federal employees. The Court reasoned that the CFC was a "nonpublic forum," *id.* at 806; that, under this Court's decisions, control over access to a nonpublic forum may be based on subject matter and speaker identity as long as the distinctions drawn are "reasonable in light of the purpose served by the forum" (and viewpoint-neutral), *ibid.* (citing *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983)); and that it was reasonable for the government to exclude the speakers in question, because they would "disrupt" the fund-raising program and

"hinder its effectiveness for its intended purpose," *id.* at 811. Under the Court's "forum analysis," *id.* at 800, the program at issue in *Cornelius* was deemed property that was not a public forum and the government was deemed to be acting, not as sovereign, regulating the speech of the citizenry, but simply as the owner of the property. In that circumstance, the Court made clear, restrictions on the speech of those permitted to use the property are reviewed deferentially, because "the Government, 'no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.'" *Ibid.* (quoting *Greer* v. *Spock*, 424 U.S. 828, 836 (1976)).

Similarly, in *Rust* v. *Sullivan*, 500 U.S. 173 (1991), the Court rejected a First Amendment challenge to regulations prohibiting entities that receive Title X grants for the operation of family-planning projects from engaging in abortion counseling. The Court held that, within "broad[] limits," when "the Government appropriates public funds to establish a program," it is "entitled to define the limits of that program" and to prohibit certain speech "to ensure that the limits of the federal program are observed." *Id.* at 193-194. Distinguishing between the government's sovereign and non-sovereign functions, the Court explained that the case involved, not "a general law singling out a disfavored group on the basis of speech," but rather a "refus[al] to fund activities, including speech, which are specifically excluded from the scope of the project funded." *Id.* at 194-195. The Court noted that a recipient of funds "is in no way compelled to operate a Title X project" and may "avoid the force of the regulations * * * simply [by] declin[ing] the subsidy." *Id.* at 199 n.5. The Court also indicated that the result would have been different if the program had involved property "traditionally open to the public for expressive activity" or "expressly dedicated to speech activity," *id.* at 200 (quoting *Kokinda*, 497

U.S. at 726), thereby suggesting that, as in *Cornelius*, the program at issue could be viewed as a nonpublic forum.[4]

The program at issue here cannot be subjected to any more rigorous scrutiny than the programs in *Cornelius* and *Rust*. In *Cornelius*, charities could participate in the CFC as long as they abided by applicable rules, including the prohibition on legal-defense and political-advocacy activities. In *Rust*, entities could receive grants to operate family-planning projects as long as they abided by applicable rules, including the prohibition on abortion counseling. And in this case, high schools may become members of an athletic association as long as they abide by applicable rules, including the prohibition on the use of "undue influence" in recruiting. In those cases, as in this one, the government provided a benefit to voluntary participants in a government-sponsored program and, as a condition of participation, restricted the participants' ability to engage in speech that the government deemed inconsistent with the program's purposes. In those

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[4] The principle applied in *Rust* has also been applied to other types of government funding. See *United States* v. *American Library Ass'n*, 539 U.S. 194, 212 (2003) (plurality opinion) ("Especially because public libraries have traditionally excluded pornographic material from their other collections, Congress could reasonably impose a parallel limitation on its Internet assistance programs. As the use of filtering software helps to carry out these programs, it is a permissible condition under *Rust*."); *Finley*, 524 U.S. at 587-588 (funding for the arts). And *Rust* itself relied on the holding of *Regan* v. *Taxation with Representation*, 461 U.S. 540 (1983), that "Congress could, in the exercise of its spending power, reasonably refuse to subsidize the lobbying activities of tax-exempt charitable organizations by prohibiting such organizations from using tax-deductible contributions to support their lobbying efforts." *Rust*, 500 U.S. at 197. See also *Grove City Coll.* v. *Bell*, 465 U.S. 555, 575 (1984) ("Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept."); cf. *Rumsfeld* v. *FAIR*, 126 S. Ct. 1297, 1307 (2006) (declining to "determine when a condition placed on university funding goes beyond the 'reasonable' choice offered in *Grove City*").

cases, the limitation on speech was reviewed, at most, for reasonableness, and there is no reason to subject the state action here to any higher standard.

Indeed, while the federal government's interest is primarily directed at ensuring that analogous government programs that involve voluntary arrangements are not subjected to the same level of scrutiny as direct regulations imposed by the government in its sovereign capacity, it is not clear that the rule at issue here merits even the kind of scrutiny employed in *Cornelius* and *Rust*. The voluntary nature of the arrangement, the rule's focus on limiting conduct as opposed to speech as such, and the essentially arbitrary nature of rules designed to preserve a level playing field all combine to make First Amendment concerns largely misplaced. To be sure, as a state actor, TSSAA could not impose non-germane restrictions on speech, but its decision to limit recruiting and restrict a coach's contact with students not enrolled at the school appears plainly germane and does not raise any obvious First Amendment concern. Beyond ensuring that the rule does not restrict non-germane speech or discriminate based on viewpoint, it is hard to imagine that detailed scrutiny of recruiting limits to level the athletic playing field is an enterprise commanded by the First Amendment. Cf. *PGA Tour, Inc.* v. *Martin*, 532 U.S. 661, 700 (2001) (Scalia, J., dissenting). In all events, the court of appeals erred in applying scrutiny substantially more rigorous than that employed in *Cornelius* and *Rust*.

b. The court of appeals did not discuss this Court's decision in *Cornelius*. Nor did it consider the possibility that a deferential standard of review was warranted because TSSAA is a nonpublic forum (or at least analogous to one), and thus the very opposite of a public forum, one of the legal contexts in which the "intermediate scrutiny" standard adopted by the court of appeals is most frequently applied (when the restric-

tion at issue is content-neutral), see, *e.g.*, *Thomas* v. *Chicago Park Dist.*, 534 U.S. 316, 322-323 & n.3 (2002); *Hill* v. *Colorado*, 530 U.S. 703, 719-730 (2000). The court of appeals did consider the possibility that this Court's decision in *Rust* supports a deferential standard of review. But it rejected that possibility, believing *Rust* inapposite because it involved a "funding program" and "government speech." Pet. App. 94a. Neither of those facts distinguishes *Rust* from this case.

As to the first asserted distinction: In deciding what level of First Amendment scrutiny is appropriate, there is no basis for distinguishing a cash "subsidy" (Pet. App. 93a) from other optional government benefits. In its non-sovereign capacity, the government confers a variety of benefits—not only "subsidies," but also (for example) salaries for "government employees," "tax exemptions," and the "use[] of public facilities." *Umbehr*, 518 U.S. at 680; accord, *e.g.*, *Finley*, 524 U.S. at 586. Indeed, the Court has suggested that *any* government benefit can be viewed as a form of "subsidy." See *Rust*, 500 U.S. at 200 (describing "Government-owned property" as a type of "Government 'subsidy'"); *Regan* v. *Taxation with Representation*, 461 U.S. 540, 544 (1983) (describing "tax exemptions and tax deductibility" as "a form of subsidy"); see also *Los Angeles Police Dep't* v. *United Reporting Publ'g Corp.*, 528 U.S. 32, 43 (1999) (Ginsburg, J., concurring) (describing provision of information about arrestees as "a kind of subsidy"). In this case, the benefits include "access to TSSAA leagues and tournaments" and "TSSAA's enforcement of its rules against competitors." Pet. App. 135a (Rogers, J., dissenting). There is no reason why an agreement to abide by the same rules, even if they incidentally restrict speech as a condition of those benefits, should be reviewed any less deferentially than restrictions on speech as a condition of the type of subsidy at issue in *Rust*.

As to the second asserted distinction: The contention that this Court's holding in *Rust* depended on the fact that "the government in that case was itself engaging in speech," Pet. App. 94a, was rejected by a plurality of this Court in *United States* v. *American Library Ass'n*, 539 U.S. 194, 213 n.7 (2003). The plurality characterized that assertion as a "misread[ing] [of this Court's] cases discussing *Rust*," *ibid.*, and explained that *Legal Services Corp.* v. *Velazquez*, 531 U.S. 533 (2001), the case on which the court of appeals relied here (Pet. App. 94a), "held only" that *Rust* is inapplicable "when the [government] does not itself speak or subsidize transmittal of a message it favors *but instead expends funds to encourage a diversity of views from private speakers*," *American Library Ass'n*, 539 U.S. at 213 n.7 (plurality opinion) (quoting *Velazquez*, 531 U.S. at 542, in turn quoting *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 834 (1995)) (brackets in original). The program at issue here was not established to encourage a diversity of views from private speakers any more than the program at issue in *Rust*.

c. The recruiting rule challenged by Brentwood prohibits "[t]he use of undue influence" on a student, or on the student's parents or guardians, "to secure or to retain [the] student for athletic purposes." J.A. 181. TSSAA has identified three reasons for the enactment of the rule: to keep high school athletics subordinate to academics; to protect student athletes from exploitation; and to foster a level playing field among the member schools. Pet. App. 97a. In agreement with the district court, the court of appeals held that all three of those justifications were legitimate (and that the first two were substantial as well as legitimate). *Id.* at 97a-100a. In light of those purposes, a rule prohibiting the use of "undue influence" in recruiting students to play on high school athletic teams is self-evidently a reasonable one, even if it might not be "the most reasonable or the only reasonable" rule.

Cornelius, 473 U.S. at 808. Indeed, setting reasonable parameters for recruiting serves many of the same purposes as setting parameters for field conditions, not to mention the length of games.

In deciding Brentwood's First Amendment challenge under a standard of "intermediate scrutiny," the court of appeals considered whether the justifications for the recruiting rule were furthered by its enforcement in this particular case. Pet. App. 102a-107a. As we explain in our discussion of the court of appeals' application of the intermediate-scrutiny standard, see pp. 27-30, *infra*, Brentwood may be able to bring an as-applied challenge to a broad *category* of conduct covered by the recruiting rule, but it cannot challenge the rule as applied only to *itself*. If that is true of the intermediate-scrutiny standard, it is *a fortiori* true of the more deferential reasonableness standard. And the recruiting rule is reasonable as applied to the broad category of conduct at issue here—*i.e.*, a coach's contact with students not yet enrolled at the school. Pet. App. 85a; see J.A. 181-185.

2. Brentwood has a contractual relationship with TSSAA

a. As the court of appeals recognized (Pet. App. 96a), the relationship between TSSAA and its member schools is contractual. "Any private or public secondary school may join the TSSAA by signing a contract agreeing to comply with its rules and decisions." *Brentwood I*, 531 U.S. at 306 (Thomas, J., dissenting). In *Umbehr*, *supra*, this Court held that, when the government restricts the speech of an independent contractor, the applicable First Amendment standard is the deferential balancing test of *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), which governs First Amendment challenges by government employees. Under that test, which reflects a recognition that "review of government employment

decisions must rest on different principles than review of speech restraints imposed by the government as sovereign," *Waters*, 511 U.S. at 674 (plurality opinion), "the interests of the [employee], as a citizen, in commenting upon matters of public concern" are balanced against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees," *Umbehr*, 518 U.S. at 676 (quoting *Pickering*, 391 U.S. at 568) (brackets in original). Brentwood's challenge to TSSAA's recruiting rule should not be subject to any standard more demanding than the *Pickering* balancing test.

The contractual relationship between a school and an athletic association is analogous to the relationship between an employee or independent contractor and the agency for which the employee or contractor works. Likewise, requiring a school that wishes to be a member of an athletic association to abide by the association's rules, including those that restrict speech, is analogous to requiring a person or entity that wishes to work for a government agency to abide by the agency's rules, including those that restrict speech. Because the Court has recognized the need for more deferential review of the government's actions in the latter context, at most a similarly deferential standard should apply in this context (if the reasonableness standard does not). As one court observed in holding that the test applies in the circumstances present here, an interscholastic athletic association "exercises no sovereign power" over a member school, which has merely "a contractual relationship" with the association; the school is "only bound by the Anti-Recruiting Rule because [the school] voluntarily applied for membership in the [association]"; and the school "can free itself from the proscriptions of the Anti-Recruiting Rule at any time by withdrawing from membership." *Rottmann* v. *Pennsylvania Interscholastic Athletic Ass'n*, 349 F. Supp. 2d 922, 930 (W.D. Pa. 2004).

The Court's decision in *Snepp*, *supra*, underscores the deferential standard of review that the Court has applied to speech restrictions voluntarily accepted by those who contract with the government. In that case, an employee of the Central Intelligence Agency (CIA) "voluntarily signed [an] agreement that expressly obligated him to submit any proposed publication for prior review." 444 U.S. at 509 n.3. The Court rejected the employee's First Amendment claim that his agreement was "unenforceable as a prior restraint on protected speech." *Ibid.* It reasoned that the agreement was an "entirely appropriate" and "reasonable means" for protecting intelligence sources and methods and thus furthering the CIA's mission. *Ibid.* (quoting court of appeals' opinion).

b. The court of appeals believed that *Umbehr* does not support application of a deferential standard of review, both because this case does not involve independent contractors (Pet. App. 91a-92a) and because, in the court of appeals' view, the standard adopted in *Umbehr* is in any event consistent with "intermediate scrutiny" (*id.* at 93a). The second asserted reason is mistaken, and the first, although correct, provides no basis for rejecting the *Pickering* balancing test.

As to the court of appeals' second reason: The intermediate-scrutiny standard, which requires, among other things, that the challenged regulation be "narrowly tailored" to further "substantial governmental interests," is more demanding than the *Pickering* balancing test. To begin with, only a limited category of speech is even presumptively entitled to First Amendment protection under the balancing test: speech expressed "as a citizen," upon "matters of public concern." *Pickering*, 391 U.S. at 568. Regardless of the strength of the government's interests in limiting it, speech enjoys no constitutional protection under *Pickering* if it is not expressed as a citizen, see *Garcetti* v. *Ceballos*, 126 S. Ct. 1951, 1957-1962 (2006), or does not address a matter of public concern,

see, *e.g.*, *City of San Diego* v. *Roe*, 543 U.S. 77, 82-85 (2004) (per curiam). And even speech that satisfies those two requirements can permissibly be restricted if the government's interests in preventing the disruption of public services outweigh the speaker's interests in the speech. See, *e.g.*, *Waters*, 511 U.S. at 680-681 (plurality opinion). Substantial deference, moreover, is accorded to the government's view of its interests. See, *e.g.*, *Umbehr*, 518 U.S. at 677-678, 685. In all of these respects, the *Pickering* standard, which reflects "a deferentially administered requirement that the government not unreasonably terminate its commercial relationships on the basis of speech," *id.* at 684, is far less stringent than the intermediate-scrutiny standard adopted by the court of appeals. Moreover, because the recruiting rule is addressed to the conduct and speech of coaches as coaches, not as citizens, and is germane to the business of the athletic association and not directed to matters of broader public concern, it easily passes muster. See *infra*, pp. 23-25.

As to the court of appeals' first reason: Although a TSSAA member school is not the same *type* of contractor as was at issue in *Umbehr*, it is a contractor nonetheless, in that it receives a benefit from the government in exchange for consideration. Just as an independent contractor provides goods and services to a government agency in exchange for a fee, a member school makes its athletic teams available to TSSAA in exchange for access to leagues and tournaments. Each type of contractor thus has a relationship with the government that is not the relationship between citizen and sovereign. And that is the relevant characteristic as far as the appropriate level of First Amendment scrutiny is concerned.

In the employee and independent-contractor contexts, application of the *Pickering* balancing test is appropriate because, when the speech at issue does not address a matter of public concern, government officials must have "wide latitude

in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Connick* v. *Myers*, 461 U.S. 138, 146 (1983); accord *Umbehr*, 518 U.S. at 677-678. And even when the speech does address a matter of public concern, an official must be able to take action when "the functioning of his office [i]s endangered." *Connick*, 461 U.S. at 153; accord *Umbehr*, 518 U.S. at 674. The same concerns *a fortiori* justify application of an appropriately deferential test here. "The operation of a sports league demands speech limits that are germane to the agreed-upon venture no less," and likely more, "than does employment" or the relationship with independent contractors. Pet. App. 138a (Rogers, J., dissenting). In particular, when a member school or its agents "engage in inappropriate activity, such as repeated unsportsmanlike conduct, or cheating, or recruiting," the athletic association "needs to be free to sanction the wrongdoer in order to maintain the quality of its programs and to serve the purposes for which it was created." *Rottmann*, 349 F. Supp. 2d at 930. If anything, therefore, the differences between an employee or independent contractor and the type of contractor at issue here call for *more* deferential review in this context. And a "proper application of the *Pickering* balancing test can accommodate the differences." *Umbehr*, 518 U.S. at 678.

c. For three independent reasons, Brentwood cannot establish a violation of the First Amendment under the *Pickering* test. First, the speech by Brentwood's football coach was expressed, not "as a citizen," but as the coach of a team that competes in a TSSAA league. The coach's letters and telephone calls to the students and their families were thus unlike "the expressions made by the speaker in *Pickering*," for example, "whose letter to the newspaper had no official significance and bore similarities to letters submit-

ted by numerous citizens every day." *Garcetti*, 126 S. Ct. at 1960.

Second, even if the speech at issue can be characterized as "citizen" speech, both the general type of speech prohibited by the recruiting rule—the use of "undue influence" to secure or retain a student for athletic purposes—and the particular speech in which Brentwood engaged—a coach's contact with students who were not yet enrolled at the school—do not "touch upon any matter of public concern." Pet. App. 138a (Rogers, J., dissenting). On the contrary, the speech, "by definition," addresses a matter of purely *private* concern: an effort to persuade students to attend the speaker's school and play on his school's athletic teams. *Rottmann*, 349 F. Supp. 2d at 930. The speech is thus even further removed from a "public concern" than the speech at issue in *Connick*, *supra*, which was held not to address any matter of public concern even though it pertained to "the confidence and trust" that employees of a district attorney's office "possess[ed] in various supervisors," "the level of office morale," and "the need for a grievance committee." 461 U.S. at 148; cf. *Roe*, 543 U.S. at 84 (noting that, "even under the view expressed by the dissent in *Connick* * * *, the speech here would not come within the definition of a matter of public concern").

Third, even if the speech at issue could somehow be thought to be speech by a citizen on a matter of public concern, member schools' interest in the speech would be "greatly outweigh[ed]" by TSSAA's interest in restricting it. *Rottmann*, 349 F. Supp. 2d at 931. The use of "undue influence" in recruiting athletes in general, and a coach's contact with a student not yet enrolled in the school in particular, have the potential to "disrupt[]," "interfere[] with," and "undermin[e]," *Connick*, 461 U.S. at 151-152, the three core values that TSSAA sought to further by enacting the recruiting rule: keeping athletics subordinate to academics, protect-

ing student athletes from exploitation, and fostering a level playing field among member schools. And TSSAA's interest in preventing that result is considerably stronger than Brentwood's interest in "recruit[ing] standout eighth grade athletes." *Rottmann*, 349 F. Supp. 2d at 931.

This case differs from *National Treasury Employees Union*, *supra*, in which this Court stated that "the Government's burden is greater with respect to [a general] restriction on expression than with respect to an isolated disciplinary action," 513 U.S. at 468, and held that the government could not discharge that burden in seeking to justify a ban on the receipt of honoraria by federal employees. Unlike the speech covered by the honorarium ban, most of which "d[id] not involve the subject matter of Government employment," *id.* at 470, and was "wholly unrelated to the workplace," *id.* at 482 (O'Connor, J., concurring in the judgment in part), the speech prohibited by the recruiting rule is directly related to interscholastic athletic competition, the subject matter of the contractual relationship between TSSAA and member schools.

B. The Court Of Appeals Also Misapplied The "Intermediate Scrutiny" Standard

1. In applying "intermediate scrutiny," the court of appeals held that only two of the three proffered justifications for the recruiting rule were substantial governmental interests and that the rule, as applied to Brentwood, was not narrowly tailored to further either of them. Pet. App. 96a-107a. In so holding, the court misapplied both the "substantial governmental interest" and "narrow tailoring" elements of the standard governing challenges to "time, place, or manner" restrictions.

a. The court of appeals held that keeping athletics subordinate to academics and protecting student athletes from exploitation are substantial governmental interests but that

fostering a level playing field among member schools is not. Pet. App. 97a-100a. The basis for that holding was that TSSAA produced no "evidence" that its interest in competitive equity in interscholastic athletics is a "substantial" one. *Id.* at 100a. The determination of whether a particular governmental interest is "substantial," however, is ordinarily a matter of judgment and common sense rather than evidence. For example, the court of appeals required a showing of a "substantial governmental interest" under the "intermediate scrutiny" standard because it believed that the recruiting rule was "analogous" to "limitations on noise, posting of signs, and distribution of religious literature." *Id.* at 89a. Yet this Court did not demand any evidentiary showing in concluding that the government had a substantial interest in "protecting its citizens from unwelcome noise," *Ward* v. *Rock Against Racism*, 491 U.S. 781, 796 (1989) (quoting *City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 806 (1984)), "eliminating visual clutter," *Taxpayers for Vincent*, 466 U.S. at 808, or "the orderly movement and control of [the] assembly of persons" at the state fair at which the religious literature was distributed, *Heffron* v. *International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 650 (1981).

Nor did the court of appeals in this case rely on any record evidence in concluding that keeping athletics subordinate to academics is a substantial governmental interest. Pet. App. 22a, 97a. And the only evidence on which it relied in concluding that preventing the exploitation of students is a substantial interest, *id.* at 98a-99a, merely confirmed what would have been obvious without the evidence. It is an equally "obvious proposition," *id.* at 145a n.2 (Rogers, J., dissenting), that teenagers who play on teams that rarely win can easily become demoralized and lose interest in athletics, which can be a critical part of a child's education and development. Under these circumstances, TSSAA's interest in competitive equity is self-

evidently a substantial one, and the court of appeals erred in requiring record evidence to prove it.

b. The basis for the court of appeals' holding that the recruiting rule fails the "narrow tailoring" requirement was that enforcement of the rule *in this case* did not further either of the interests that the court found to be legitimate and substantial. Pet. App. 100a-107a. Thus, with respect to TSSAA's interest in preventing the exploitation of student athletes, the court reasoned that, because the students contacted by Brentwood's football coach had already signed enrollment contracts with the school and were informed that spring practice was optional, "neither students nor parents were exploited in theory or in fact." *Id.* at 103a (quoting district court's decision). And with respect to TSSAA's interest in keeping athletics subordinate to academics, the court reasoned that, because incoming students also received information from Brentwood about academics and other activities, the coach's letters and telephone calls did not have any effect on "the relative standing of academics and athletics at the school." *Id.* at 106a. In finding a First Amendment violation in this case, the court stated that "application of the recruiting rule to other schools communicating in similar ways to students" might *not* be unconstitutional, because, for example, "it is possible that letters and calls similar to the ones at issue here *would* be exploitative in a different context." *Id.* at 102a n.11 (emphasis added). The court of appeals' holding leaves no room for legitimate prophylactic rules and reflects a fundamental misunderstanding of the "narrow tailoring" requirement in cases presenting as-applied challenges to "time, place, or manner" restrictions.

This Court has squarely "rejected the * * * view that [an] 'as applied' challenge require[s] the State to show that [the plaintiff's] particular conduct in fact trenched on the interests that the regulation sought to protect." *United States*

v. *Edge Broad. Co.*, 509 U.S. 418, 431 (1993). The State is "entitled to protect its interest[s] by applying a prophylactic rule to th[e] circumstances [of the plaintiff's acts] generally"; it is not required "to go further and to prove that the state interests supporting the rule actually were advanced by applying the rule in [the plaintiff's] particular case." *Ibid.* Accordingly, while a plaintiff may be able to bring an as-applied "time, place, or manner" challenge to a "broad category" of conduct, he cannot challenge a regulation "as applied only to himself or his own acts." *Ibid.*; see, *e.g.*, *Edenfield* v. *Fane*, 507 U.S. 761, 763 (1993) (holding that a ban on solicitation by certified public accountants violates the First Amendment "as applied * * * in the business context").

Edge Broadcasting and *Edenfield*, the decisions cited above, are both commercial-speech cases, as is *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447 (1978), another case in which the same principle was applied, see *id.* at 462 (State need not demonstrate that "evils" regulation seeks to prevent are present in each case). As the Court observed in *Edge Broadcasting*, however, "the validity of time, place, or manner restrictions is determined under standards very similar to those applicable in the commercial speech context." 509 U.S. at 430; see *Florida Bar* v. *Went For It, Inc.*, 515 U.S. 618, 623 (1995) ("we engage in 'intermediate' scrutiny of restrictions on commercial speech"). The Court therefore relied on a "time, place, or manner" decision, *Ward*, *supra*, in holding that the validity of a restriction on speech is not to be judged "by the extent to which it furthers the Government's interest in an individual case." *Edge Broad.*, 509 U.S. at 430-431; see *Ward*, 491 U.S. at 801 ("the validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case").

Other decisions of this Court, moreover, have applied the same principle in addressing as-applied challenges to "time, place, or manner" restrictions. See *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 296-297 (1984) ("the validity of this regulation need not be judged solely by reference to the demonstration at hand"); *Heffron*, 452 U.S. at 652 ("The justification for the Rule should not be measured by the disorder that would result from granting an exemption solely to [the plaintiff]."). The decision on which the court of appeals relied (Pet. App. 107a n.15), *Taxpayers for Vincent*, *supra*, is not to the contrary. In rejecting an as-applied challenge to a ban on the posting of signs on public property, this Court did not hold that the interests supporting the ban were furthered in that particular case; it held that "the city's esthetic interests were * * * substantial" and that posted signs "by their very nature, wherever located and however constructed, can be perceived as an 'esthetic harm.'" 466 U.S. at 807-808 (quoting *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 510 (1981) (plurality opinion)).

The dissenting judge in the court of appeals was therefore correct when he said that "TSSAA is not required to demonstrate that each time it enforces the anti-recruiting rule[] it is stamping out the exploitation of student athletes or the bending of academics to the will of athletics for the anti-recruiting rule[] to be valid." Pet. App. 144a (opinion of Rogers, J.). It is sufficient that the conduct prohibited by the rule, "in the aggregate," leads to "the exploitation of student athletes or the subordination of academics to athletics." *Ibid.* By holding that the purposes of the recruiting rule must be furthered in every case and that they were not furthered in this one, the court of appeals not only disregarded this Court's precedents on as-applied challenges to "time, place, or manner" restrictions; it effectively converted the recruiting rule into a standard (designed to avoid the exploitation of student athletes or

the subordination of academics to athletics) and found that the standard was not violated in this case. The First Amendment does not grant courts such authority.

2. If the court of appeals had properly applied intermediate scrutiny, the recruiting rule would have satisfied that standard. Of course, the court of appeals' more fundamental mistake was to apply intermediate scrutiny, as opposed to substantially more deferential review, in the first place. In either event, the decision below was erroneous and should be reversed.

CONCLUSION

The judgment of the court of appeals as to the First Amendment claim should be reversed.

Respectfully submitted.

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In The
Supreme Court of the United States

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION,

Petitioner,

v.

BRENTWOOD ACADEMY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF *AMICI CURIAE* OF THE ARIZONA INTERSCHOLASTIC ASSOCIATION, INC., COLORADO HIGH SCHOOL ACTIVITIES ASSOCIATION, IDAHO HIGH SCHOOL ACTIVITIES ASSOCIATION, KANSAS STATE HIGH SCHOOL ACTIVITIES ASSOCIATION, MISSOURI STATE HIGH SCHOOL ACTIVITIES ASSOCIATION, NEBRASKA SCHOOL ACTIVITIES ASSOCIATION, NEW MEXICO ACTIVITIES ASSOCIATION, OREGON SCHOOL ACTIVITIES ASSOCIATION, AND WYOMING HIGH SCHOOL ACTIVITIES ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Amici will address the following two questions, which are addressed as part of the question framed in the petition for certiorari filed by the Tennessee Secondary School Athletic Association ("TSSAA"):*

> Whether the Sixth Circuit erred in holding that a voluntary agreement to join a high school athletic and activity association and abide by such association's bylaws and interpretive rules, such as the voluntary agreement between the TSSAA and Brentwood Academy is irrelevant to a First Amendment constitutional analysis?
>
> Whether the Sixth Circuit erred in declining to recognize the substantial interest of state activity associations in fostering fair and level competition among member schools for purposes of protecting the best interests and safety of minor high school student participants?

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* *Amici* unequivocally support the Petitioner's basis for appeal. *Amici* believes, however, that the Sixth Circuit's underlying reasoning that the voluntary agreement to join a high school athletic and activity association and abide by such association's bylaws and interpretive rules, such as between the TSSAA and Brentwood Academy, is irrelevant to a First Amendment constitutional analysis, and the Sixth Circuit's declination to recognize any substantial state interest in fair and level competition for purposes of the best interests and safety of minor student participants, impacts each of the *Amici* and its member schools, both public and private, more directly and substantially, and have therefore elected to focus this presentation on the foregoing questions.

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INTEREST OF *AMICI CURIAE*[1]

The *Amici* are all high school activity and athletic associations[2] (hereinafter collectively referred to as "the *Amici* or the associations"). The *Amici* respectfully submit this brief *Amici Curiae* pursuant to Rule 37.2(b) of the Rules of the Supreme Court of the United States. The *Amici* are nonprofit associations formed under the laws of their respective states by action of each such association's member schools, both public and private. Membership in each of the *Amici* is voluntary and is comprised of various public and private high schools within their respective states. None are agencies or subdivisions of the state or local governments. The *Amici* are not supported directly by tax dollars, and derive the largest portion of their modest revenues from member dues and gate receipts.

The purpose of the associations is to implement rules for interscholastic competition promulgated by the member schools, and to oversee and conduct interscholastic competitions between member schools. All of the *Amici* provide in their constitutions for a democratic governing structure whereby the member schools, public and private, participate in the development, drafting, and approval of

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[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court of the United States, the *Amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than the *Amici* and their respective counsel made any monetary contribution to the preparation or submission of this brief.

[2] Arizona Interscholastic Association, Inc. (AIA), Colorado High School Activities Association (CHSAA), Idaho High School Activities Association (IHSAA), Kansas State High School Activities Association (KSHSAA), Missouri State High School Activities Association (MSHSAA), Nebraska School Activities Association (NSAA), New Mexico Activities Association (NMAA), Oregon School Activities Association (OSAA) and Wyoming High School Activities Association (WHSAA).

all rules governing the member schools and the participation of students in activities sponsored by the associations. To that end, the *Amici* have each enacted bylaws and rules governing member high schools, including rules establishing eligibility requirements for participating in interscholastic athletic competitions.[3] Members contractually agree to abide by these member promulgated bylaws and rules. In many associations, each year the board of education of each public school and the governing board of each private school will pass a resolution stating that such school accepts the constitution and bylaws of the voluntary association as the minimum standards for conducting the school's interscholastic program.

These voluntary activities associations are committed to the development of America's youth through participation in high school interscholastic competition in a myriad of activities, including athletics, speech, debate and music. The *Amici* submit this brief and urge this Court to reverse the decision of the Sixth Circuit because the governance of interscholastic competition by and among the member schools of each of the above named activities associations

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[3] The constitution and bylaws of each of the *Amici* Activities Associations and the National Federation of High School Associations can be found on their respective internet websites, to-wit: National Federation of High School Associations – http://www.nfhs.org; Arizona Interscholastic Association, Inc. – http://www.aiaonline.org; Colorado High School Activities Association – http://www.chsaa.org; Idaho High School Activities Association – http://www.idhsaa.org; Kansas State High School Activities Association – http://khsaa.org; Missouri State High School Activities Association – http://www.mshsaa.org (2006-2007 Official MSHSAA Handbook provided in PDF format upon request); Nebraska School Activities Association – http://www.nsaahome.org; New Mexico Activities Association – http://www.nmact.org; Oregon School Activities Association – http://www.osaa.org; and Wyoming High School Activities Association – http://www.whsaa.org.

has been and will continue to be directly, substantially and adversely impacted by the Sixth Circuit Court's ruling.

The District Court and the Sixth Circuit (1) incorrectly concluded that the voluntary agreement to join a high school athletic and activity association and abide by such association's bylaws and interpretive rules, such as that between the TSSAA and Brentwood Academy, is irrelevant to a First Amendment constitutional analysis; and (2) incorrectly declined to recognize the substantial interest of high school activities associations in fair and level competition to protect the best interests and safety of minor student participants.

Because of the unique perspective and role of activity associations in their respective states that serve to promote interaction and cooperation between public and private schools in the United States to the benefit of the students that those schools seek to educate, the *Amici* believe that the attached brief will aid this Court in considering the issues presented at bar. The *Amici* believe that this brief can add insight as to why it is important for this Court to reverse the Sixth Circuit Court of Appeals, and sustain the sanctions imposed by the TSSAA on its member school Brentwood Academy for violation of rules designed to preserve competitive equity for and promote the safety of the students of all member schools, public and private.

SUMMARY OF ARGUMENT

I. *A private school's voluntary contract with a high school activity association and its participation in the democratic rule making process of such association constitutes a voluntary and knowing limit on the scope of such private*

school's Constitutional rights under the rules so promulgated. The Sixth Circuit incorrectly focused on the question of whether Brentwood Academy had waived its right to sue on the basis of its constitutional rights. Rather the Sixth Circuit should have focused on the nature of the agreement entered into between the private school and the association it voluntarily joined. By joining the activities association and entering into an agreement to abide by the bylaws and rules established by the member schools to provide for fair and equal competition, a private school is agreeing to participate in the democratic rule making process, and voluntarily and knowingly limiting the scope of its Constitutional rights regarding the rules so promulgated. By ignoring those facts, the Sixth Circuit majority enables the private school to defy what is in effect its own rule.

The Sixth Circuit's holding creates a serious dilemma for activities associations. Either the association can (1) stay the course and risk years of economically devastating litigation; (2) rescind any challenged rule; (3) not apply a challenged rule to private schools; or (4) exclude private schools from membership. Alternative (1) is unpalatable for not-for-profit organizations like the *Amici*. Alternative (2) would fundamentally change the nature of the program of competition and disregards the legitimate programmatic objectives of the majority of the member high schools. Alternative (3) would lead to a patently un-level playing field among the members. Alternative (4) is really the only viable alternative left to these associations.

The Sixth Circuit's holding is particularly problematic for the *Amici* because of the inherently speech-related activities they govern (speech, debate, music) and because of competition rules that of necessity restrict speech. An association could be confronted with defending a

constitutional lawsuit under intermediate scrutiny by a music competitor who wanted to perform a composition not on the approved list; and the association would have the burden of showing a legitimate and substantial interest in prohibiting non-list compositions and that the interest is served by prohibiting the particular non-list composition.

II. *Activity associations have a "substantial interest" in fostering a level playing field for student competitors in high school activities*: The Sixth Circuit erred in finding as part of its First Amendment analysis of the TSSAA recruiting/undue influence rule under the "intermediate scrutiny" standard that the association did not have a substantial interest in "fostering a level playing field." Activity associations have as their central purposes the fostering and maintenance of a level playing field for the students competing in the activity programs of member high schools. Each association's rule making process involves educators who are specialists in the field of fostering, promoting and caring for the safety and best interests of students, and assuring that students participating in school activities are provided a fair chance to participate in a manner that enhances their education and does not exploit them. The principle of competitive equity or a level playing field is a basic value of schools, in fact of our society as a whole, and is clearly a "substantial interest" of activity associations such as the *Amici*. The Sixth Circuit failed to acknowledge that fairness and comparable opportunity are inherently part of any competitive endeavor.

For the foregoing reasons, the *Amici* submit that the judgment of the Sixth Circuit should be reversed.

ARGUMENT

Interscholastic activities supplement and enhance the educational experience of the students of participating schools. The mission statements of the *Amici* echo this tenet.[4] Interscholastic competition in athletics, speech, debate and music instill in students an appreciation of teamwork, responsibility to self and others, personal discipline and the satisfaction of achieving a team or personal goal: attributes that cannot always be conveyed in an academic setting. These attributes are benefits that stay with students for the rest of their lives. However, high school activities must be kept subordinate to the academics program and student progress therein. The lower courts in the present case correctly recognized this hierarchy of academics over activities.[5] However, the Sixth Circuit failed to recognize the critical interest of activity associations to foster the educational value of activities through competitive equity, and that the voluntary agreement of member

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[4] See, by way of example, WHSAA, Rule and Regulations, "Values" page 6, "The WYOMING HIGH SCHOOL ACTIVITIES ASSOCIATION believes that ***interscholastic activities programs are essential to the education of youth, and therefor, are an integral part of the school curriculum*** . . . ***The values of high school activities and their impact upon the lives of Americans are immeasurable*** . . . ***Not only do interscholastic activities benefit and directly influence participants, but they also instill pride and unifying spirit among students, fans, schools, and communities throughout the nation. The inherent values of activity programs are both realistic and vivid.***

[5] The Sixth Circuit Court of Appeals in its majority opinion found that the TSSAA, in promulgating the recruiting/undue influence rule, had a legitimate and substantial interest in keeping high school athletics in their proper place subordinate to academics and in protecting student athletes from exploitation. *Brentwood Academy v. Tennessee School Athletic Association, et al.*, 442 F.3d 410, 425 (6th Cir. 2006) (hereinafter referred to as "Brentwood III").

schools to abide by rules is essential to protect that interest.

I. The Sixth Circuit erred in holding that a voluntary agreement to join a high school activity association and abide by such association's bylaws and interpretive rules was irrelevant to a First Amendment constitutional analysis.

The Sixth Circuit erred in focusing on whether Brentwood Academy waived its right to challenge the constitutionality of a TSSAA rule rather than focusing on the nature of the agreement entered into between the private school and the association. *Brentwood Academy v. Tennessee Secondary School Athletic Association, et al.*, 262 F.3d 543, 549-551 (6th Cir. 2001) ("Brentwood II").

A. *Voluntary Associations of Educational Institutions*: Public and private schools have formed voluntary associations to establish rules of competition that keep activities in their proper place as an enhancement of the curriculum and overall educational experience of the students that they serve. All of the *Amici* employ a school member representative based rule making process to establish the bylaws necessary to further these goals. The representatives of each member school, public and private, are educators who are charged with the education and with the care and safety of the students participating in school activities. These educators bring their expertise to the adoption of the rules needed to assure that activities are (1) kept in their proper place as an extension of the classroom; (2) not a deterrent to student learning; (3) available to the maximum number of students; and, (4) safe and in the best interests of all students. These educator representatives develop, draft and adopt the bylaws

which govern the activities of their respective schools. It is through this democratic representative rule making process that member schools, like Brentwood Academy, can seek the adoption of a new rule, a change in an existing rule, or the outright repeal of a rule. Such a member based legislative process has been described as "the most elemental hallmark of the democratic process and one of associative groups – a majority vote." *Archbishop Walsh High Sch. v. Section VI of the N.Y. State Pub. High Sch. Athletic Ass'n*, 88 N.Y.2d 131, 138, 666 N.E.2d 521, 524 (N.Y. 1996).

By joining the activities association and entering into an agreement to abide by its bylaws and rules, a private school agrees to participate in the democratic rule making process, and voluntarily and knowingly limits the scope of its Constitutional rights with regard to the rules so promulgated. By ignoring these salient facts, the Sixth Circuit majority enables the private school to challenge what are in effect its own rules. Such a circumstance cannot stand, as it is essential to activity associations that each of the member schools that voluntarily join the association abide by a common set of rules.

B. *Participation in the Democratic Rule Making Process Limits the Scope of Private School's Constitutional Rights*: In *Vernonia Sch. Dist. 47j v. Acton*, 515 U.S. 646, 132 L. Ed. 2d 564 (1995), this Court found that students voluntarily relinquished Fourth Amendment search and seizure protections in order to participate in high school activities.[6] Similarly, by choosing to join an activities

[6] "There is an additional respect in which school athletes have a reduced expectation of privacy. By choosing to 'go out for the team,' they voluntarily subject themselves to a degree of regulation even higher

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association and participating in the association's democratic rule making process, private schools voluntarily relinquish some constitutional rights with regard to the application of association bylaws and rules to their speech. Such a rule protects the constitutional rights of the private schools, while recognizing their voluntary relinquishment thereof to preserve the fair and equal participation in interscholastic activities.

C. *A "Defacto" Two Class Membership*: The Sixth Circuit decision creates a defacto two class membership among the *Amici*, one class made up of private schools and the other of public schools, each having markedly different rights.

1. *Private School Members*: This Court in *Brentwood Academy v. Tennessee Secondary School Athletic Association, et al.*, 531 U.S. 288, 305, 121 S. Ct. 924, 935, 148 L. Ed. 2d 807, 823 (2001), and the Sixth Circuit in *Brentwood II*, recognized that private schools are beneficiaries of the protections of the First Amendment and Fourteenth Amendment to the U.S. Constitution against state action by way of a cause of action brought under 42 U.S.C. § 1983. Thus, any decision of an activities association addressing the conduct of interscholastic programs of private schools or actions of individual private school instructors or coaches could be deemed an infringement upon protected speech; such protections being subject only to the voluntary limits on such rights relinquished by the private school (see infra).

2. *Public School Members*: Conversely, the protections of the First Amendment and Fourteenth Amendment

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than that imposed on students generally." *Vernonia Sch. Dist. 47j v. Acton*, 515 U.S. 646, 657 (1995).

are not available to public school districts, or their employees acting within the scope of their duties. In *Triplett v. Tiemann*, 302 F. Supp. 1239, 1242 (D. Neb. 1969), several public school districts sued the State Board of Education seeking to have a state funding statute declared unconstitutional under the supremacy clause and the equal protection clause. The court dismissed the public schools' equal protection claim, holding that the Fourteenth Amendment has no application to the acts of a State against its own political subdivisions.[7]

In *Garcetti v. Ceballos*, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006), this Court held that, "When public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.* at 1960, 164 L. Ed. at 701. Thus, any decision of an activities association addressing the content of school programs of public schools or actions of individual public school instructors or coaches would NOT implicate rights protected by the Constitution.

Thus, while a public school cannot legally challenge the constitutionality of an association bylaw, a private school has the right to challenge the constitutionality of every association bylaw or interpretive rule.

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[7] "The plaintiff school districts are legally not subject to injury under the Equal Protection Clause. The Equal Protection Clause of the Fourteenth Amendment has no application to the acts of a State against its own political subdivisions [citations omitted]." *Triplett v. Tiemann*, 302 F. Supp. 1239, 1242 (D. Neb. 1969).

3. *Between a Rock and a "Hard Place"*: The Sixth Circuit's holding creates a serious dilemma for activities associations. Either the association can (1) stay the course and risk litigation; (2) rescind any challenged rule; (3) exempt private schools from challenged rules; or (4) exclude private schools from membership. None of these options is in the best interests of the children. However, setting the best interests of students aside from a legal standpoint, the *Amici* find themselves in a no-win situation – either continue to allow private school membership and elect between alternative (1), (2) or (3), or be reduced to alternative (4) and exclude private schools altogether.

a. *Continue Private School Membership Notwithstanding the Private Schools' First Amendment Rights*: The Sixth Circuit holding that the private schools' voluntary agreement to abide by association bylaws does not abrogate any First Amendment right means that such schools may challenge any association rules on the basis of a violation of freedom of speech, religion, or association.[8] For the *Amici*, this dilemma is even more problematic because of their rules that of necessity restrict speech within the context of competition in the inherently speech-related activities they govern (speech, debate and music, and in some states drama and/or journalism). Many associations have rules that govern the "time, place and manner" of speech at such contests, some of which may in fact not be content-neutral.[9] This Court has given schools

[8] The First Amendment assures the freedom of expression, including the implied right of association. The Supreme Court first recognized this right in *NAACP v. Alabama*, 357 U.S. 449, 460-61, 2 L. Ed. 2d 1488, 78 S. Ct. 1163 (1958).

[9] See, 2006-2007 OSAA, Speech Handbook, Rule 13.5.4(c), "Offensive humor and materials shall not be permitted"; IHSAA – Activities

(Continued on following page)

broad powers to limit the time, place, manner and content of student speech, and have applied those broad powers to extra-curricular activities. See, *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 106 S. Ct. 3159 (1986) (where this Court found that a school district acted entirely within its permissible authority in imposing sanctions upon a student in response to his offensively vulgar, lewd, obscene or plainly offensive speech); and, *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 108 S. Ct. 562 (1988).[10] The deference given schools in the context of student speech should apply to speech of a member school that is regulated to protect the children served by all of the member schools of an activities association.[11]

Regulations, Speech, "Use of Materials": "1. Material presented by all contestants shall be appropriate for competition and public performance by high school students. A signed Principal's Approval Form must be submitted to both district and state tournament managers to verify the principal's approval of all material presented by his/her students"; see, also, NSAA, "Rules of Competition," Play Production ByLaws (5.5.1).

[10] In *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), this Court held that while students in the public schools do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate, school authorities may place limitations on student speech if they have reason to believe that such expression will substantially interfere with the work of the school or impinge upon the rights of other students; and that a school need not tolerate student speech that is inconsistent with its basic educational mission, even though the government could not censor similar speech outside the school.

[11] The rationale for such deference was eloquently stated by the Missouri Court of Appeals in a 1973 dispute over the Missouri State High School Activity Association's summer camp rule in *Art Gaines Baseball Camp, Inc. v. Houston*, 500 S.W.2d 735, 740-41 (Mo. App. 1973):

> Along with entrusting the education of our children to teachers and administrators, we also entrust the control and supervision of the extracurricular activities incident to that education. Implicit in the responsibility for these activities

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Under the Sixth Circuit's holding, an association could be confronted with defending a constitutional lawsuit, under intermediate scrutiny, by a music competitor who wanted to perform a composition not on the approved list, or by a speech contestant whose speech contained cursing or was immorally suggestive. The association would have the burden of showing a legitimate and substantial interest in prohibiting such conduct.

(1) *Absurd Result*: No association can function if each application of a common competition rule is subject to First Amendment constitutional litigation. All activities require a common set of rules for effective, fair and rewarding competition that supports the educational mission of the participating schools.

(a) *Competition Rules*:

(i) *Athletic Competition*: There are numerous applications of rules that limit the freedom of individuals and teams in athletic competition (football – off sides, pass interference; basketball – double dribble; wrestling – prohibiting a slam take down; track and field – requiring an athlete to stay within the discus ring for a

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is the power to make reasonable rules and regulations. We are dealing here with numerous schools who have voluntarily joined an association. **As members of this association, they may, by majority vote, enact rules to govern their interaction. It is obvious that chaos would result without such rules**. It is also obvious that the members are in the most advantageous position to appreciate the regulations under which they must act to achieve desired goals. A court should not interfere with the enactment of those regulations as long as they are reasonable and do not infringe on public policy or law. (Emphasis added; footnotes omitted).

throw to count; baseball and softball – three strikes and you're out!!).

(ii) *Scholastic Competition*: Activity association rules for scholastic competitions frequently address issues that implicate speech: e.g., debate contests – no scouting by a coach, judge or contestant in order to obtain advance information or an opponent's case or argument; speech contest – approval of content of material presented;[12] music contest – performance of compositions only on the approved list provided by the association; one-act play contest – material presented must be appropriate for competition and public performance by high school students;[13] and drill team/cheerleading – dress standards.[14]

(b) *Conduct Rules*: All activities associations have rules requiring students to conduct themselves in a "sportsman-like" manner during interscholastic competition. Such conduct rules prohibit certain types of physical or verbal expressions that are not acceptable or may endanger personnel. These conduct rules certainly inhibit the "free" exercise of speech, association and action.

Competition and conduct rules and regulations are an inherent part of any interscholastic competition. They establish the basic structure of competition and level the playing field to give each student and team an equal chance

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[12] See, footnote 9 infra.

[13] See, WHSAA, State Drama Tournament – Rules and Regulations, 8.4.3, Choice of Material, page 101, "Instructors will exercise good judgment in selecting plays with literary theatrical merit and which are suitable for high school level audiences."

[14] See, IHSAA – Activities Regulations – Dance/Drill, "Dress Standard": Dress Standard – Idaho dance/drill teams are expected to wear costumes which are appropriate for participation at the high school level.

at success. The *Brentwood II* and *Brentwood III* decisions destroy equal application of such rules of competition. To subject the application of every competition and conduct rule when applied to a private school or its students to a First Amendment "intermediate scrutiny" standard would make governance of high school activities impossible.

(2) *Constant Cloud of Litigation*: The *Amici* will continually be threatened with litigation over the enforcement of their rules. Such threat will either chill the application of rules or require associations with limited resources to defend multiple court actions to establish that each regulation that is challenged is "content-neutral" under the First Amendment intermediate scrutiny test.

b. *Exclusion of Private School Members*: All of the *Amici* have as members the large majority all of the high schools participating in interscholastic activities in their respective states. Excluding private schools from their membership invites litigation. Some courts have required activity associations to admit private school members,[15] while others have upheld the denial of membership.[16] In either case, the associations were required to

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[15] See, *Friends Academy v. Section VIII of New York State Public High School Athletic Ass'n*, 154 Misc. 2d 1 (N.Y. Misc. 1992), where the court held the denial of membership to an activities association constituted a constitutionally impermissible denial of the nonpublic school's right to equal protection under the law, and declared the nonpublic school a member of the association.

[16] *Archbishop Walsh High Sch. v. Section VI of the N.Y. State Pub. High Sch. Athletic Ass'n*, 88 N.Y.2d 131 (N.Y. 1996) held that the association's member referendum requirement did not deprive a private school of equal protection of the law, stating that the association's membership qualifications for nonpublic schools were consistent with and furthered the identified purposes by reasonably assuring that all

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incur the substantial cost to defend the decision to deny private school membership. The *Brentwood II* and *III* decisions will bring further pressure to separate the high school activities of public and private schools. And to what end – the exclusion of valued members of the associations to the detriment of the students of both private and public schools?

II. The Sixth Circuit erred in declining to recognize the activity associations' substantial state interest in fostering fair and level competition among member schools established for the purpose of protecting the best interests and safety of minor high school student participants.

"Undue influence/recruiting rules" are essential to foster a level playing field, the primary purpose of which is to promote and foster competitive equity among schools in order to serve the best interests of the educational experience and welfare of all students. High school athletic and activity associations have as one of their central purposes the fostering and maintenance of a level playing field among member high schools. The Sixth Circuit held that the TSSAA had a legitimate interest "in fostering a level playing field," but that such interest was not substantial (*Brentwood III*, 442 F. 3d. at 425). The Court based this decision on a purported lack of evidence, stating "defendants (the TSSAA) can cite no evidence to support the notion that ensuring that high schools compete in interscholastic sports in an equitable manner is a substantial

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member schools had the opportunity to compete on a relatively *level playing field*.

state interest." *Brentwood III*, 442 F. 3d. at 427. Such a statement ignores the basic mores of fairness that are a part of our American society and of league competition: "fairness" in the sense of comparable opportunity which is an inherent part of any competitive endeavor. In athletic competition, as in many other activities, the need to give both sides a fair chance for success is self-evident and does not require proof to establish that it is substantial.

A. *Activity Associations Have a Substantial Interest in Competitive Equity Among Member Schools*: Another term used by courts for "level playing field" is "competitive equity." The critical importance of "competitive equity" has been recognized by courts throughout the country. See, *Cardinal Mooney High School v. Michigan High School Athletic Ass'n*, 437 Mich. 75 (Mich. 1991) (Age eligibility rule was held to be reasonably drafted to accomplish the association's purpose of maintaining "competitive equity" among member schools); *Indiana High Sch. Ath. Ass'n v. Reyes*, 694 N.E.2d 249, 257-258 (Ind. 1997) (Upheld association's penalties for using ineligible players); and, *Jones v. California Interscholastic Federation*, 197 Cal. App. 3d 751, 758 (Cal. Ct. App. 1988) (Upheld rule that created opportunity for younger students and competitive equity among association member schools by averting situations where teams of more veteran athletes encounter teams from schools where athletes have not been held back). Competitive equity provides greater opportunities for student participation and enhances the benefits of participation, such as the rewards of striving for and achieving a goal, being part of a team effort, dealing with success and failure, and knowing that effort will be required in some fashion and that success is possible. Where competitive equity is not maintained, these ideals become

frustrated. Students quickly discern that goals either need to be diminished or cannot be achieved, fewer experience success, and participation is stunted.

B. *A Level Playing Field or Competitive Equity Promotes Student Safety and Welfare*: The level playing field concept directly addresses issues and concerns for student safety and welfare, particularly in contact sports. Student safety is a universally recognized substantial interest of high school activities associations. Courts throughout the country have recognized the critical role activity association bylaws, rules, and regulations play in promoting the safety and best interests of students through fostering a level playing field.

1. *The "Age Rule"*: All of the *Amici* have an "Age Rule";[17] an objective rule that establishes an age limitation, usually 19 or 20, for participation. The Age Rule protects the safety of younger participants with or against whom an older participant might compete or participate.[18]

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[17] See, Age Rule: CHSAA, Constitution and Bylaws, Article 17, ByLaw 1760; "Recruiting"; IHSAA, Rules and Regulations, Rule 8-2; KSHSAA, Rules and Regulations Governing Grades 7-12, Rule 17, "Age"; MSHSAA, 2006-2007 Official Handbook ByLaw "Age Requirements" 232, page 26; NSAA, Bylaws for All Activities, ByLaw 2.3, "Age"; NMAA, Rule 6.4, "Undue Influence"; OSAA, Rules, Rule 8.3 "Age"; WHSAA, Rules, 6.3.0 "Age Requirements."

[18] "There is a legitimate state interest sustaining the [Age 19] rule – the safety of the younger players." *Arkansas Activities Ass'n v. Meyer*, 304 Ark. 718, 724 (Ark. 1991). See, also, *Baisden v. W. Va. Secondary Schs. Activities Comm'n*, 211 W. Va. 725, 737, 568 S.E.2d 32, 38 (W. Va. 2002), where the court upheld the application of the age rule to a student who was six feet four inches tall, weighed 280 pounds, ran the forty-yard dash in 5.3 seconds, and would compete in this contact sport against students approximately five years younger; stating: ***The safety of younger, smaller, more inexperienced students would be***

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2. *Eight Semester Rule*: The "Eight Semester Rule" levels the playing field by preventing the practice of "red-shirting" students for athletic purposes. See, *Jones v. California Interscholastic Federation*, supra, 197 Cal. App. 3d 751, 758 (Cal. Ct. App. 1988); *Baisden v. W. Va. Secondary Schs. Activities Comm'n*, supra, 211 W. Va. 725, 732, 568 S. E. 2d 32, 39 (W. Va. 2002).[19]

3. *Classification of Schools*: All of the *Amici* classify school members by student enrollment. The rationale of such classifications has been noted by at least one association.[20] The MSHSAA in an unreported state

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unreasonably compromised." (Emphasis added); and, *Pottgen v. MSHSAA*, 40 F.3d 926, 929 (8th Cir. 1994), where the court held that the age limit rule was an essential eligibility requirement in a high school interscholastic program designed to help reduce the competitive advantage flowing to teams using older athletes; protect younger athletes from harm; discourage student athletes from delaying their education to gain athletic maturity; and prevents over-zealous coaches from engaging in repeated red-shirting to gain a competitive advantage. The court stated, ***"These purposes are of immense importance in any interscholastic sports program."*** (Emphasis added).

[19] In *Baisden v. W. Va. Secondary Schs. Activities Comm'n*, supra, 211 W. Va. 725, 732, 568 S.E.2d 32, 39 (W. Va. 2002), the court cited *Hamilton v. West Virginia Secondary Schools Activities Commission*, 182 W. Va. 158, 386 S.E.2d 656 (1989), which described "red shirting" as follows: "Red-shirting is a practice of delaying a student's academic pace and postponing his initial participation in athletics to permit him to gain physical and athletic maturity before beginning the period of eligibility for competitive athletics . . . ***It is the cynical and pernicious manipulation of a student's academic standing for the derivative athletic glory of adults – over-zealous coaches and parents . . . It is a corrupt and mean-spirited practice.***" (Emphasis added).

[20] See, IHSAA, Rules & Regulations, Rule 2 – Classification: 2-1 School enrollment will be the initial basis for establishing classification. Decisions on final placement may include consideration of the following factors: 1. Minimizing loss of instructional time; 2. Reducing travel time and distance; 3. Facilitating equitable scheduling; 4. **Maximizing**

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trial court case articulated the "primary objectives for classifying schools in athletic competition" as being (a) to provide for more equitable competition in team activities; (b) to provide for more equity among schools competing in team and group activities; (c) to protect the physical welfare of students engaging in contact sports; and, (d) to expedite the administration of district and state events with a minimum of conflict with the academic program.[21]

Significantly, the plaintiff in that case, a student in a private school, challenging a possible change in the classification of the MSHSAA member school she attended, asserted among the reasons that her school should not be moved to a higher class, that her teammates and herself would be competing against "teams with more players, more depth, subjecting plaintiffs to an increased risk of injury."[22]

4. *Undue Influence/Recruiting Rule*: All of the *Amici* have an "undue influence" and/or recruiting rule.[23] Unlike the Sixth Circuit, courts in other jurisdictions have

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attention to safety concerns relative to competitive scheduling and pairing. (Emphasis added).

[21] *Lauren Bax, et al. v. Missouri State High School Activities Association*, Circuit Court of Boone County, Missouri, Case No.: 02CV167612, pages 4-5.

[22] *Id.* at pages 3-4.

[23] See Undue Influence/Recruiting Rules: CHSAA, Constitution and Bylaws, Article 19, ByLaw 1900, "Recruiting"; IHSAA, Rules and Regulations, Rule 8-15; KSHSAA, Rules and Regulations Governing Grades 7-12, Rule 19, "Undue Influence"; MSHSAA, 2006-2007 Official Handbook, ByLaw "Undue Influence" 216, page 24; NSAA, Bylaws for All Activities. ByLaw 2.8, "Undue Influence"; NMAA, Rule 1.8, "Undue Influence"; OSAA, Rules, Rule 8.7 "Undue Influence"; WHSAA, General Member School Rules and Regulations, Undue Influence, 4.1.0.

found that activities associations, and their member schools, have a substantial interest in protecting students from such recruiting and protecting other students from the effects of recruiting on the playing field.[24]

The interest of activity associations in securing student safety and welfare is paramount to association member schools, and establishes a clear "substantial interest" that needs no specific data; it is self evident and settled law. This "substantial interest" clearly meets the third prong of the intermediate scrutiny standard applied by the Sixth Circuit in the *Brentwood* decisions.

5. *Other Rules that Level the Playing Field*: All of the *Amici* have rules that require regular student attendance in school, domicile requirements to prevent transfers for athletic purposes between school years or between activity seasons, prescribe amateurism and limit monetary awards to students. The core philosophy behind these rules is that students play where they reside, they do not transfer for athletic reasons without suffering restrictions on their eligibility, they play without monetary reimbursement, and coaches are restrained from offering inducements that would cause students to suffer loss of eligibility. These core standards are essential and interrelated to create the unique amateur school programs that are played across America under "Friday night lights."

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[24] See, *Mississippi High Sch. Activities Ass'n v. Coleman*, 631 So. 2d 768 (Miss. 1994); *Kentucky High School Athletic Association v. Hopkins County Board of Education*, 552 S.W.2d 685, 687 (Ky. App. 1977); *Mozingo v. Oklahoma Secondary Sch. Activities Ass'n*, 575 P.2d 1379 (Okla. Ct. App. 1978); and, *In re United States ex rel. Missouri State High School Activities Assoc.*, 682 F.2d 147 (8th Cir. 1982)).

CONCLUSION

A private school's determination to enter into a contract with a high school activity association and its participation in the democratic rule making process of such association constitutes a voluntary and knowing limit on the scope of such private school's Constitutional rights to challenge the rules so promulgated. Further, the high school activity associations with both public and private school members have a "substantial interest" in fostering a level playing field for student competitors in high school activities.

For the reasons set forth above, the *Amici* submit that the judgment of the Sixth Circuit should be reversed.

Dated: February 15, 2007.

Respectfully submitted,

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No. 06-427

IN THE

Supreme Court of the United States

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION,

Petitioner,

—v.—

BRENTWOOD ACADEMY,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICUS CURIAE* ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL IN SUPPORT OF RESPONDENT

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Brief for the Petitioner, Brentwood Acad. v. *Tennessee Secondary School Athletic Ass'n*, 535 U.S. 971 (2002) (No. 01-1117) 3

INTEREST OF *AMICUS CURIAE* AND SUMMARY OF ARGUMENT

This brief is submitted on behalf of *amicus curiae* Association of Christian Schools International ("ACSI").[1] ACSI is a nonprofit organization that exists to equip Christian educators in the United States and abroad to teach children effectively. It does so by providing to its member schools a variety of services, including student activities, school accreditation, administrative certification, legal and legislative services and the like. ACSI currently has 3,796 member K-12 schools with 740,882 students in the United States. Brentwood Academy ("Brentwood") is a member of ACSI.

ACSI submits this brief because of its strong interest in preserving the First Amendment rights that make real school choice possible — rights that would be threatened if the ruling of the Court of Appeals were reversed. At issue in this case is a so-called Recruiting Rule of a Tennessee athletic association, previously held by this Court to be a state actor, that cuts deeply into the ability of private schools to describe their athletic programs to parents of prospective students and to the students themselves. Coaches in particular are singled out for especially sweeping speech restrictions. Before students are enrolled and have attended classes for three days, coaches are barred from contacting them and from discussing need-based financial aid at all. Even if the student initiates contact with respect to need-based financial aid, an often itical subject for parents and students deciding which school to attend, the coach may not respond.

The effect of the Recruiting Rule is therefore to ban discussion of entire topics — athletics and need-based finan-

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[1] This brief *amicus curiae* is submitted with the consent of all parties to these actions. Letters to that effect have been filed with the Court. No counsel for a party authored this brief in whole or in part.

cial aid — by particular persons for long periods of time. The Recruiting Rule is thus a content-based restriction on speech subject to strict scrutiny under the First Amendment, a legal test that cannot be met by the Tennessee Association. The Sixth Circuit held, incorrectly in our view, that the rule was content neutral but nonetheless held it unconstitutional on an as applied basis. In this brief, we urge the Court to apply strict scrutiny and on that basis to hold the relevant portions of the Recruiting Rule unconstitutional.

ACSI believes that its member schools have a right to tell parents of prospective students about the education that they offer: one that emphasizes intellectual, physical, and spiritual development. An accurate and complete description of that education necessarily includes information about the schools' athletic programs, and about the need-based financial aid that can make such education attainable for lower-income families. ACSI also believes that prospective students and their parents have a corresponding right to receive the information necessary to determine which school best fits their educational and economic needs. The government's role in regulating interscholastic sports cannot justify abridging the long-standing right of schools, students, and parents to share truthful information about education. Carefully drafted rules to prevent the exploitation of student-athletes serve parents and children alike, but sweeping limits on speech about education disserve all.

At an earlier stage in this case, two of the nation's leading educators, Chester E. Finn, Jr. and Daniel Casse,[2] summed up the core issues in this litigation:

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[2] Finn is the president of the Thomas B. Fordham Foundation, which supports research on national education issues, and is a former Assistant Secretary of Education for Research and Improvement and a founding member of the Edison Project. Casse is a senior director of the White House Writers Group and has served as an aide to the Secretary of Education.

> [T]his is a case involving fundamental First Amendment freedoms, which in this case arise in an athletic context but which go to the heart of issues involving access to quality education and school choice. . . . The hostility to students' access to choices in selecting their secondary school is palpable in the regulation under challenge. And the particular method of resisting access to educational quality through choice — the suppression of speech — is peculiarly odious in a democratic society because it suggests that government somehow has a right to expect students to attend (and play sports for) public schools. But children are not the property of the state, and government cannot stifle access to educational opportunity through censorship.
>
> These are important national issues in education, and they far transcend the characterization of the issues as described in the panel opinion. As we understand it, these free speech claims could have been brought even in the absence of a specific episode, so the concern about judicial micromanagement of sports eligibility questions is not really the core question here. Accountability of public education officials, and access to information that allows informed educational choice and access to quality education are the critical issues in this litigation.[3]

Those words are just as apt today.

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[3] Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, Exhibit E, 5-6 and 8-9, *Brentwood Acad. v. Tennessee Secondary School Athletic Ass'n*, 535 U.S. 971 (2002) (No. 01-1117).

STATEMENT OF THE CASE

This is a case about the right of private secondary schools to provide accurate information to prospective students and their parents and, at least as important, the right of those individuals to gather the information that will assist them in deciding whether and where to apply for admission. The Tennessee Secondary School Athletic Association ("TSSAA" or "Tennessee Association") coordinates, supervises, and regulates interscholastic athletic competition among both public and private high schools in Tennessee.[4] This Court has previously held that the Tennessee Association is a state actor for purposes of 42 U.S.C. § 1983. *Brentwood Acad.* v. *Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288 (2001) ("*Brentwood I*"). Brentwood, a private high school, is one of approximately 370 schools that participate in the Tennessee Association. *Brentwood Acad.* v. *Tennessee Secondary School Athletic Ass'n*, 304 F. Supp. 2d 981, 992 (M.D. Tenn. 2003). About 50 of those 370 schools are private. *Id.* Brentwood and the TSSAA dispute whether a TSSAA rule that places significant limits on speech by member schools to prospective students and their parents violates the First Amendment.

The TSSAA's bylaws contain a "Recruiting Rule" that, read with its guidelines, broadly bars communications between prospective students and their parents and the schools they may be considering. Section 21 provides that:

> [t]he use of undue influence on a student (with or without an athletic record), the parents or

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[4] As the district court observed, "the TSSAA is effectively the only game in town" for interscholastic athletics in Tennessee. 304 F. Supp. 2d at 997. All public high schools in Tennessee that compete in interscholastic sports are members of the TSSAA, J.A. 291-292, and the TSSAA does not permit its member schools to play non-member schools. J.A. 192-194.

> guardians of a student by any person connected, or not connected, with the school to secure or retain a student for athletic purposes shall be a violation of the recruiting rule.

J.A. 181.[5] The guidelines to the Rule then make clear that, in order to avoid "undue influence" on prospective students (including students "without an athletic record"), Section 21 effectively prohibits virtually all school-initiated "contact" of prospective students who may engage in athletics:

> Q. What are some of the guides used in determining whether there has been undue influence used which would result in a violation of the recruiting rule?
>
> A. Some examples are, but not limited to:
>
> * * *
>
> 3. Any initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/athlete enrolled in any member school except where there is a definite feeder pattern.
>
> 4. Any initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/athlete in the seventh grade and above at any non-member school except where there is a definite feeder pattern involving the schools.

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[5] "J.A." refers to the parties' joint appendix filed in this Court. References to the trial transcript that are not included in the joint appendix are cited by date and page number.

J.A. 182.[6] The result, as phrased by the chair of the Tennessee Association's Board of Control, Michael Reed, is that "[a]nything that a coach or someone within the community does or says to an athlete trying to get him to go to a certain school is undue influence." Trial Tr., Dec. 17, 2002, at 1354-55. This is so without regard to the intent of the speaker since, as the executive director of the Tennessee Association testified, "there can be a violation of the Recruiting Rule without an 'intent' to violate," 304 F. Supp. 2d at 992.[7]

On their face, the guidelines also appear to restrict speech on behalf of a school even when a student initiates a discussion. The guidelines declare that "a coach" in particular "may not contact a student or his or her parents prior to his [or her] enrollment in the school," J.A. 181, a provision schools have understood to mean that coaches may not speak to prospective students at all before enrollment. For example, Ellis Haguewood, the headmaster of the Memphis University School, testified that "[the] recruiting rule forbids any contact, not just initial contact, with a coach at that school before the student is enrolled." Trial Tr., Dec. 13, 2002, at 588. Furthermore, even if the general ban on contact by coaches only prevented *initial* contact, the guidelines would still unequivocally prohibit coaches from discussing "financial aid based on need" with any prospective student, no matter who initiates the discus-

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[6] A feeder pattern is a form of affiliation between schools where the students of one school routinely "feed" into the other — *i.e.* attend the other — when they graduate. As the district court observed, "the bottom line is that schools in a 'feeder pattern' can make certain school-initiated, targeted speech that schools, such as Brentwood Academy, outside the 'feeder pattern,' cannot make." *Brentwood Acad.*, 304 F. Supp. 2d at 996.

[7] The assistant executive director of the Tennessee Association testified as well that "[w]e don't get into intent. I mean the rule doesn't speak to intent." Trial Tr., Dec. 30, 2002, at 2580.

sion, until after a student has already enrolled and attended three days of school. Explicitly barred is any:

> [d]iscussion of financial aid based on need with any prospective student/athlete by any member of the coaching staff until the student has enrolled in school (attended 3 days of school). . . .

J.A. 182. The Recruiting Rule therefore significantly impairs the ability of students and their parents to choose a school on the basis of the need-based financial aid the student might receive.[8]

In 1997, the Tennessee Association began investigating Brentwood after coaches at other schools complained that Brentwood had violated TSSAA rules. In the spring of 1997, Brentwood's athletic director and football coach, Carlton Flatt, sent a form letter to "all incoming ninth grade male students[] whose parents had already signed enrollment contracts" inviting the students to participate in spring football practice. *Brentwood Acad.*, 304 F. Supp. 2d at 986. At the time Coach Flatt sent the letter, the rules of the Tennessee Association permitted spring practice and allowed incoming students to participate. *Brentwood Acad.* v. *Tennessee Secondary Schools Athletic Ass'n*, 442 F.3d 410, 419 n.2 (6th Cir. 2006). After parents of some incoming students asked whether attendance at the practices was mandatory, Flatt made follow-up calls to

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[8] Undisputed testimony before the trial court from the Tennessee Association itself demonstrated that need-based financial aid to students at Brentwood was just that. Bernard Childress, an assistant executive director of the Tennessee Association, testified without contradiction that his job was to ensure that the financial aid schools gave was truly need-based. Determinations of need are initially made by an out-of-state independent firm and then policed by Childress to assure strict compliance with TSSAA rules. Childress testified that all the cases he had seen indicated that Brentwood's aid was need-based. Trial Tr., Dec. 30, 2002, at 2584-2587.

students' families clarifying that attendance was completely optional. Nonetheless, after coaches at other schools complained to the TSSAA, the TSSAA concluded that the form letter and the clarifying phone call had violated the Recruiting Rule. As punishment, Brentwood's entire athletic program was placed on probation for four years, its football and boys' basketball teams were prohibited from engaging in off-season practice and declared ineligible for the playoffs for two years, and Brentwood was fined $3,000. *Brentwood Acad.* v. *Tennessee Secondary Schools Athletic Ass'n*, 13 F. Supp. 2d 670, 676-78 (M.D. Tenn. 1998), 180 F.3d 758 (6th Cir. 1999), *rev'd*, 531 U.S. 288, 293 (2001).[9]

After unsuccessful appeals within the Tennessee Association, Brentwood brought this federal action against the TSSAA and its executive director. Brentwood sued under 42 U.S.C. § 1983 for, among other things, violations of its First Amendment right to free speech. In July 1998 the district court granted partial summary judgment in favor of Brentwood, holding that the Tennessee Association was a state actor, that the Recruiting Rule was a content-based regulation of speech subject to strict scrutiny, and that the Rule violated the First Amendment both facially and as applied.

The Court of Appeals for the Sixth Circuit initially reversed on the ground that the Tennessee Association was not a state actor. Brentwood petitioned for a writ of certiorari and the writ was issued. This Court reversed the Sixth Circuit, holding that the Tennessee Association is a state actor for purposes of 42 U.S.C. § 1983. *Brentwood I*, 531 U.S. 288.

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[9] A second charge, beyond the scope of this brief, related to the alleged furnishing of two tickets to a football game to two eighth-grade student-athletes. *See Brentwood Acad.*, 442 F.3d at 435-38 (holding Brentwood's procedural due process rights had been violated in regard to the ticket allegations).

On remand the court of appeals reversed the district court's summary judgment ruling, rejecting its First Amendment analysis on the theory that the Recruiting Rule was not a content-based rule subject to strict scrutiny, but rather a content-neutral time, place, and manner regulation subject to intermediate scrutiny. *Brentwood Acad.* v. *Tennessee Secondary Schools Athletic Ass'n*, 262 F.3d 543, 552 (6th Cir. 2001). The case was remanded to the district court to determine, among other things, if the Recruiting Rule, as applied to Brentwood, violated the First Amendment.

After a bench trial, the district court concluded that the Recruiting Rule as applied to Brentwood violated the First Amendment and that the penalties imposed by the Tennessee Association against Brentwood were void. 304 F. Supp. 2d 981 (M.D. Tenn. 2003).

The Tennessee Association appealed, the Sixth Circuit upheld the district court's decision, 442 F.3d 410 (6th Cir. 2006), and this Court issued a writ of certiorari.

ARGUMENT

The Recruiting Rule Is a Content-Based Restriction on Speech that Violates the First Amendment

The First Amendment rights at issue here arise in an athletic context, but their importance reaches far beyond sports. Whatever this Court decides, its ruling will directly affect parents' ability to receive the information they need to determine the right school for their children. If parents cannot learn, before they decide which secondary school their children will attend, about the nature of the programs that schools offer, and specifically about whether their children will be eligible for need-based financial aid, they may well be deprived of the very information they need most in order to make their decision. At the same time, the Tennessee Association's Recruiting Rule makes it more difficult for private high schools to compete for students. Most public high schools have certain natural advantages over most private high schools. They do not charge tuition, they have networks of middle schools that automatically send them students every year, and they are geo-

graphically convenient to the parents and students they serve. The many private schools without these advantages must therefore cultivate other strengths in order to compete. When regulators effectively preclude schools from speaking to prospective students about school programs and financial aid, private schools suffer in a way that their public brethren do not. Such restrictions inhibit robust competition for students and so prevent meaningful school choice.

As interpreted by the Tennessee Association, the Recruiting Rule barring "undue influence" to "secure or retain" students "for athletic purposes" severely limits private schools from speaking with prospective students or their parents. Specifically, as interpreted by the official guidelines, the Rule prohibits schools from engaging in "any initial contact or prearranged contact" with individual prospective students. J.A. 182. The guidelines single out coaches for special speech restrictions. Before students are enrolled, coaches are barred from contacting them and from discussing need-based financial aid at all, even if the student initiates contact. J.A. 181-82. The impact of the Recruiting Rule is therefore to ban discussion of entire topics — athletics and need-based financial aid — by particular persons for long periods of time. All this is done in a supposed effort to prevent truthful speech from having an "undue influence" on students and parents choosing between public and private schools. But as defined and enforced, the effort to avoid "undue influence" has resulted in a flat ban on speech highly relevant to a parent's informed decision as to which school her child should attend.

As the district court concluded in July of 1998, the Recruiting Rule is thus a content-based restriction of speech subject to strict scrutiny under the First Amendment. The Sixth Circuit misapprehended the nature of First Amendment law, misinterpreted the Rule as content-neutral, and proceeded to decide the cause on that basis. Although Brentwood ultimately prevailed in its as applied challenge to the Rule, this

Court's decision to grant review makes this a propitious time to correct the Sixth Circuit's inapt legal analysis and, having done so, to affirm on that basis.[10]

I. On Its Face, the Recruiting Rule Is a Content-Based Restriction on Speech

A content-based regulation controls speech based on what is said — the content of a message, not the time, place, or manner in which the message is communicated. There are at least three kinds of content-based regulations relevant to this case.[11]

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10 The broadly phrased question presented in this case was "whether the Sixth Circuit correctly held . . . that TSSAA violated the First Amendment . . . rights of Brentwood Academy . . . . " Pet. at i.

11 The merits brief of Brentwood Academy and the brief *amici curiae* of the Roman Catholic Diocese of Nashville, Tennessee, and Father Ryan High School both addressed the various efforts of the TSSAA to persuade the Court that Brentwood either waived its constitutional rights or should be deemed to be otherwise precluded from asserting them. We offer one additional observation with respect to the Solicitor General's brief arguing that this case is akin to those involving government funding or programs. It is that the two cases chiefly relied upon in that brief are of little more than passing relevance here. *Rust* v. *Sullivan*, 500 U.S. 173 (1991) involved (and was rooted in) the power of Congress to "fund one activity to the exclusion of [an]other." *Id.* at 193. Here, as the petition itself observed (pp. 29-30), the Tennessee Association "receive[s] no state funding and finances [its] operations through modest membership dues and gate receipts at tournament games." In *Cornelius* v. *NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788 (1985), this Court concluded that the government does not violate the First Amendment when it prevents certain organizations from participating in a charity drive aimed at federal employees. Of course, no access to a government program is sought by Brentwood here and what *Cornelius* did *not* say is that the government could conceivably have conditioned an organization's inclusion in the charity drive on a waiver

Footnote continued on next page.

First, this Court has observed that the apprehension of "[l]isteners' reaction to speech is not a content-neutral basis for regulation." *Forsyth County* v. *Nationalist Movement*, 505 U.S. 123, 134 (1992). If a rule is passed chiefly for reasons relating to the effect of expression on listeners — for example, to prevent listeners from learning about a particular topic — the rule is content-based even if it does not directly prohibit particular viewpoints, topics, or types of speakers. *Id.*, *see also United States* v. *Playboy Entm't Group, Inc.*, 529 U.S. 803, 811 (2000) (finding a regulation to be content-based when the "overriding justification for [a] regulation is concern for the effect of the subject matter on young viewers").

Second, this Court has held that a rule can be content-based even if it does not prohibit the expression of a particular point of view but merely prohibits discussion of a topic or subject matter. *Consol. Edison Co.* v. *Public Service Comm'n*, 447 U.S. 530, 537 (1980); *see also Arkansas' Writers Project, Inc.* v. *Ragland*, 481 U.S. 221, 230 (1987). Thus a rule prohibiting discussion of financial aid or athletics is, by its nature, content-based.

Third, rules dictating which speakers may address a topic are content-based. *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 784-85 (1978) (the state may not dictate "the speakers who may address a public issue"); *cf. Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557 (1995) (a parade is a form of speech, not merely a form of association, and control over the selection of speakers/participants in a parade is a content-based regulation of that speech).

Footnote continued from previous page.

of its First Amendment rights. *See 44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 513 (1996) ("Even though government is under no obligation to provide a person, or the public, a particular benefit, it does not follow that conferral of the benefit may be conditioned on the surrender of a constitutional right.")

The Tennessee Association's Recruiting Rule is a content-based regulation in all three ways identified above.

The text of the Rule is expressly concerned with, and only concerned with, the feared effect that speech may have on the students and parents who listen to it. The Rule is therefore content-based under this Court's analysis in *Forsyth County* v. *Nationalist Movement*, 505 U.S. 123, 134 (1992). *Forsyth County* concerned a parade ordinance that permitted a government administrator to vary the fee for parading to reflect the estimated cost of maintaining public order. This Court held that the ordinance was content-based, in part, because the County justified its fee by looking to costs associated with the public's reaction to the content of the message conveyed by the parade:

> In order to assess accurately the cost of security for parade participants, the administrator must necessarily examine the content of the message that is conveyed, estimate the response of others to that content, and judge the number of police necessary to meet that response. The fee assessed will depend on the administrator's measure of the amount of hostility likely to be created by the speech based on its content. Those wishing to express views unpopular with bottle throwers, for example, may have to pay more for their permit.
>
> Although petitioner agrees that the cost of policing relates to content, it contends that the ordinance is content neutral because it is aimed only at a secondary effect — the cost of maintaining public order. It is clear, however, that, in this case, it cannot be said that the fee's justification has nothing to do with content.

Forsyth County, 505 U.S. at 134 (internal citations and quotation marks omitted). If the ordinance in *Forsyth County* was content-based because its administration required contemplation of the public's reaction to speech, then the Recruiting Rule's limits on discussion between schools, the parents of

students who might attend them, and the prospective students themselves to assure that the forbidden speech does not unduly influence those who hear it is more than enough to make the Rule content-based.

Likewise, the text of the Rule and its guidelines make it clear that the Rule is designed to preclude discussion of particular topics and to limit which speakers may address them. Whether a school representative may speak to a prospective student depends entirely on whether that representative's speech is related to recruitment or athletics. The Rule is explicitly concerned with limiting schools' ability to "secure or retain" students "for athletic purposes." Moreover, the Rule's guidelines make clear that the Rule prohibits school-initiated speech with any prospective student — speech obviously related to recruitment — for any reason:

> Some examples are . . .
>
> * * *
>
> 3. Any initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/athlete enrolled in any member school except where there is a definite feeder pattern.
>
> 4. Any initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/athlete in the seventh grade and above at any non-member school except where there is a definite feeder pattern involving the schools.

Since the text of the Rule itself defines students covered by the rule as persons "with or without an athletic record," the commentary effectively bars school representatives from initiating any discussion with any prospective student so long as it is "for athletic purposes." And since "there can be a violation of the Recruiting Rule without an 'intent' to violate," 304 F. Supp. 2d at 992, a great deal of speech to students who never have and never will participate in sports may be deemed to violate the Rule.

The guidelines also limit which speakers may address particular topics, explicitly prohibiting coaches from "contacting a student or his or her parents" and from engaging in any "discussion of financial aid based on need" with a prospective student until the student has already enrolled and has been at the school for at least three days. J.A. 182. The natural and obvious intended impact of singling out coaches for a total ban on pre-enrollment speech (and, in particular, a total ban on pre-enrollment speech with students about financial aid) could hardly be clearer: it prevents students and their parents from learning much about a school's athletic program and virtually anything about the availability of need-based financial aid before they decide whether to apply — in short, from learning enough to determine whether the school is right for them at the time it is most important to have that information.

If there were any doubt about this, testimony in the trial makes plain that the punishment of Brentwood was content-based. The chair of the Tennessee Association's Board of Control, Michael Reed, directly admitted this:

> Q. . . . Now let me just ask you once again to look at the spring practice letter and the basis for the board's decision, the consensus decision of the Board of Control. As I understand it, the factors that went into you determining that this was a violation were the message of the spring practice letter, the person that wrote the letter, which was Coach Flatt, the person who received the letter, the fact that the students were enrolled in other schools, and the impact that the message had on the students or that you thought it would have on the students?
>
> A. Content of the letter.
>
> Q. Okay.
>
> A. The message that it sends.
>
> * * *

> Q. . . . I just want to make sure I have all the factors that led you to convict Brentwood Academy based on this letter.
>
> A. Okay. You have got -- you have the letter going out to athletes.
>
> Q. The fact it was from Coach Flatt, correct?
>
> A. It was from Coach Flatt.
>
> Q. A famous coach?
>
> A. A well known coach.
>
> Q. A well known coach?
>
> A. Okay.
>
> Q. The impact it's going to have on the reader?
>
> A. Right.

Trial Tr., Dec. 17, 2002, at 1397-1399. As the district court noted in its opinion, the executive director of the Tennessee Association gave similar testimony to the effect that "the Spring Practice Letter and follow-up calls were harmful undue influence because of their contents." 304 F. Supp. 2d at 991 (summarizing testimony). Given this and other evidence, the district court determined that the punishment of Brentwood was content-based:

> The Court finds that the preponderance of the credible evidence at trial is that the substantive "content" of the Spring Practice Letter and calls mattered and was a significant factor in the TSSAA's decision that the letter and calls constituted "undue influence" and violated the Recruiting Rule. The TSSAA penalized Brentwood Academy for the substantive "content" of the Spring Practice Letter and calls and the message they conveyed in this case.

Brentwood Acad., 304 F. Supp. 2d at 992 n.4.

Nothing in either opinion of the court of appeals after this case was last passed upon by this Court provides any basis for

concluding that the speech restrictions imposed by the TSSAA were anything but content-based. That "the recruiting rule does not constitute a total ban on communications between secondary schools and prospective students regarding athletic programs." *Brentwood Acad.*, 262 F.3d at 552, 442 F.3d at 430 n.14, is beside the point. Here, as in *United States* v. *Playboy Entertainment Group, Inc.*, "[i]t is of no moment that the [rule] does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree . . . . [C]ontent-based burdens must satisfy the same rigorous scrutiny as . . . content-based bans." 529 U.S. 803, 812 (2000). The threshold question is whether the Recruiting Rule is content-based, not whether it constitutes a "total" ban.

The court of appeals was similarly mistaken when it relied on the availability of other channels of communication for Brentwood's message — media other than school-initiated contact — as a reason why the ban on speech was not content-based. 262 F.3d at 552. Brentwood, the court wrote, has "multiple ways of communicating with middle school students to provide them with information about the academic, athletic, and spiritual aspects of the educational experience at Brentwood." 262 F.3d at 552. In essence, the court of appeals concluded that the Recruiting Rule was not content-based because the Rule did not entirely destroy Brentwood's ability to communicate. Such reasoning is directly at odds with this Court's decisions. *See Linmark Assocs., Inc.* v. *Twp. of Willingboro*, 431 U.S. 85, 94 (1977) (that a rule bans "only one mode of communication . . . does not transform [the rule] into a 'time, place, or manner' case"); *City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410, 430 (1993) (a regulation of expression that is neither content-neutral nor narrowly tailored is not a legitimate time, place, or manner restriction "regardless of whether or not it leaves open ample alternative channels of communication").

The Sixth Circuit was also in error when it relied on the supposed lack of evidentiary support for the position that the Recruiting Rule was "designed by TSSAA out of fear of what prospective students would learn about the athletic programs

at independent secondary schools." *Brentwood Acad.*, 262 F.3d at 553. If the Recruiting Rule was passed chiefly because of the effect schools' speech would have on listeners, the Rule is content-based even if it was not passed out of such a fear. And as the text of the Rule itself plainly seeks to prevent "undue influence" on students and their parents, the self-evident purpose of the Rule is to control the effect of speech on listeners. What else could the purpose possibly be of barring coaches from discussing need-based financial aid with prospective students? Moreover, evidence set forth above in the trial that followed the Sixth Circuit's decision demonstrated conclusively that the Rule *was* indeed "designed by TSSAA out of fear of what prospective students would learn about the athletic programs at independent secondary schools."

The Sixth Circuit's last reason for concluding that the Rule was not content-based was that while coaches were subjected to special limits on their speech, they were not completely deprived of the ability to communicate with students:

> Although the rule emphasizes that coaches and members of the coach's staff must refrain from exerting "undue influence" by initiating contact with prospective students, the rule does not ban these persons from communicating with students who themselves initiate contact.

Brentwood Acad., 262 F.3d at 553. This reasoning is flawed on several levels. As an initial matter, it is not at all clear that coaches are permitted even to respond to queries from prospective students and certainly not about need-based financial aid. More fundamentally, even if coaches were permitted to respond to direct questions, their inability to utter a word about the availability of need-based financial aid without being asked remains a substantial — and surely an intended — barrier to meaningful communication. The restrictions on the speech of coaches are, on their face, plainly content-based.

II. The Recruiting Rule Cannot Withstand Strict Scrutiny

Once the Recruiting Rule is correctly treated as a content-based restriction, its unconstitutionality is readily apparent.

Content-based restrictions of speech are "presumptively invalid," *R.A.V.* v. *St. Paul*, 505 U.S. 377, 382 (1992), and the Recruiting Rule does not rebut that presumption. In order to overcome the presumption of invalidity, a state must show "that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221, 231 (1987). To be "narrowly drawn," the law must be the "least restrictive means" to further the government's articulated interest. *Sable Commc'ns of Cal., Inc.* v. *FCC*, 492 U.S. 115, 126 (1989).

The district court concluded that there were three state interests supporting the Recruiting Rule: (1) "keeping high school athletics 'in their proper place' subordinate to academics"; (2) "protecting student-athletes from 'exploitation'"; and (3) "fostering a 'level playing field' between schools for 'competitive equity.'" *Brentwood Acad.* v. *Tennessee Secondary School Athletic Ass'n*, 304 F. Supp. 2d 981, 994 (M.D. Tenn. 2003).[12] While the state clearly has a compelling interest in protecting student-athletes from exploitation, and a substantial interest in subordinating athletics to academics, its "interest in controlling which schools or teams win athletic contests" is not even substantial. *Brentwood Acad.*, 304 F. Supp. 2d at 994. Students may well be more inclined to participate in sports if there are more schools with a good chance of winning a championship, but most students will never win a championship, and they know it, yet they still choose to play. High school sports can and do thrive in the absence of enforced parity. In any event, competitive equity between pub-

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12 The Tennessee Association did not proffer the third interest until its 2001 appeal to the Sixth Circuit.

lic and private schools has become an even weaker justification for the Recruiting Rule since the Tennessee Association segregated private schools that offer need-based financial aid into a separate division. J.A. 145-46. Because private schools such as Brentwood no longer compete with public schools, they pose less of a threat to the win-loss records of public school coaches.[13]

In contrast, the state's interest in keeping athletics subordinate to academics is certainly important and arguably compelling, and its interest in preventing the exploitation of students is unquestionably compelling. The Recruiting Rule, however, is not narrowly drawn to fit either of these interests. The Rule prevents schools from telling prospective students and their parents about athletic programs, and it frustrates schools' ability to speak about the availability of need-based financial aid. Informing students of such things does not, in and of itself, denigrate academics or exploit students. To the contrary, it allows students and parents to make an informed judgment as to whether a particular school would be worth the cost of tuition. Such information is crucial if private schools are to attract lower-income students and their parents. Bill Brown, the former headmaster and the founder of Brentwood Academy, testified to that effect when he explained why Brentwood challenged the constitutionality of the Recruiting Rule. In particular, Brown noted that providing information about sports to prospective students and their parents directly

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13 The well-being of coaches seems to be a significant concern for the Tennessee Association. As the district court noted, "[TSSAA Executive Director] Carter stated that the absence of any Recruiting Rule would result in a 'war zone' and *coaches' resignations*." 304 F. Supp. 2d at 992 (emphasis added). Likewise, Morris Rogers, a member of the Tennessee Association's Board of Control, acknowledged that the Recruiting Rule's "obvious" purpose was "really for protection of schools and coaches." J.A. 368.

serves to advance the cause of academics because it helps private schools reach students who might otherwise eschew the rigorous curriculum of a school like Brentwood. Sports draw the attention of lower-income parents who are less likely to be aware of other aspects of Brentwood's educational mission:

> Q. . . . . What was your — your third concern or reasons for pursuing the litigation?
>
> A. Well, we wanted to be sure — the way I worded it was defending the school to operate and tell the story in the community and [to] prospective families who had expressed interest in Brentwood Academy, including those who can assure diversity within our student body, which was very difficult for us to do. We were very concerned about going into the lower income families, we needed more in that area, and it's very difficult for them to get the story unless you're proactive in giving it. The only thing they hear is the sports page and they hear the athletic side, so that's a lot of times that's why you help them with lower income families so many people who have athletic backgrounds investigating independent schools.

Trial Tr., Dec. 30, 2002, at 2482-83. Ellis Haguewood, the headmaster of the Memphis University School, testified to the need to speak about financial aid:

> Q. Do you find at all that the affluence of the parents is a factor in selection of public versus private schools?
>
> A. Yes.
>
> Q. How so?
>
> A. Because we charge tuition, and so right off you have a choice of not paying or a choice of having to pay to go to a private school. And so there is that barrier immediately in the minds of the parents who [think], well, I can't afford [an]

> independent school. Not even — won't even consider it because of the cost of the tuition, not knowing necessarily that there's need based financial aid available, just doesn't have that information.

Trial Tr., Dec. 13, 2002, at 595. Taken together, these passages well illustrate the vices of the Recruiting Rule's speech restrictions. If sports are a tool for drawing the attention of lower-income parents, and if need-based financial aid is a crucial factor in convincing lower-income parents to enroll their children, then the Recruiting Rule's prohibition against coaches talking to students and parents about need-based financial aid is surely a serious impediment to school choice.[14]

The Recruiting Rule is hardly the least restrictive means to further the state's interests in keeping athletics subordinate to academics and in preventing the exploitation of students. There are many narrower alternatives, including some that would not burden speech at all. Indeed, the Tennessee Association already has rules and guidelines that serve the state's interests. After this case began, it banned spring practices. *See Brentwood Acad.*, 442 F.3d at 419 n.2. The Recruiting Rule itself prohibits fraudulent, coercive or harassing conduct, such as "offering an incentive or inducement to a student." J.A. 181. Other rules restrict current high school students' ability to transfer to other schools for athletic purposes by limiting their athletic eligibility and by making schools forfeit games in which ineligible students participate. J.A. 167-76. In addition, financial aid must be need-based, and "[s]chools shall remove any student from athletic eligibility whose accounts with the school are 60 days overdue." J.A. 187-88. Yet another TSSAA rule provides that "[s]tudents shall be

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[14] A detailed analysis of the benefits to students from participating in school-based athletics is set out in Section II(b) of the brief *amicus curiae* of the National Women's Law Center.

regularly enrolled, in regular attendance, and carrying at least five full courses." J.A. 151. This last rule suggests another avenue the Tennessee Association could take to further its interests: instead of inhibiting school choice, it could demand better academic performance from student-athletes. At present, students can compete so long as they earn at least a "D-" in all of their courses. J.A. 150-151; J.A. 408. The Tennessee Association could dramatically advance its ostensible goals, if it chose to, by raising that requirement.

Finally, the Recruiting Rule's ban on speech to parents deserves special emphasis in any discussion of its overbreadth. While it is troubling enough to insist that children must be sheltered from information about their educational options, it is especially offensive to conclude that the First Amendment permits a state entity to keep parents ignorant of such options.

CONCLUSION

The decision of the court of appeals should be affirmed.

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March 27, 2007

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No. 06-427

In the Supreme Court of the United States

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION,

Petitioner,

v.

BRENTWOOD ACADEMY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* OF BOYD-BUCHANAN SCHOOL, SILVERDALE BAPTIST ACADEMY, CHATTANOOGA CHRISTIAN SCHOOL, and GRACE BAPTIST ACADEMY OF CHATTANOOGA IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

The *Amici Curiae* are all small independent private schools located in southeastern Tennessee (hereinafter "Small Independents") and are currently voluntary members of the Tennessee Secondary School Athletic Association (hereinafter "TSSAA"). The Small Independents are comprised of private schools with enrollments of fewer than 500 students. Collectively, more than 1,237 students attend their secondary grade levels.[2] The Small Independents do not provide financial aid to athletes at the varsity level and they compete with public schools in TSSAA's Division I.[3] Brentwood Academy (hereinafter "Brentwood") competes in Division II, which allows need-based financial aid for varsity level athletics.

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[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court of the United States, the *Amici Curiae* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than the *Amici Curiae* and their respective counsel made any monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.3, letters evidencing this consent by TSSAA have been filed with the Clerk. Consent letter from Brentwood Academy is attached hereto as Exhibit A.

[2] Boyd-Buchanan School has 347 students; Chattanooga Christian School has 405 students; Grace Baptist Academy of Chattanooga has 181 students; and Silverdale Baptist Academy has 165 students.

[3] The TSSAA by-laws provide for two divisions into which schools are placed for tournament competition: Division I are schools whose student athletes compete at the varsity level and do not receive need-based financial aid. Division II are those schools whose student athletes compete at the varsity level but may be the recipients of need-based financial aid.

The Small Independents and similar institutions, not only throughout Tennessee but the country, have a vital and unique interest in the outcome of this case and are compelled to file this *Amici Curiae* brief to assist the Court in assessing both the policy and prosaic ramifications of the case on entities other than the parties. The interests of the Small Independents are not represented by either the TSSAA or Brentwood, the original plaintiff in the underlying case. Brentwood is not the voice of all private school members of the TSSAA in this matter. This is not a simple public versus private school dispute and the Small Independents represent a third constituency in this instance whose needs and opinions run contrary to the voice of the more affluent private schools such as Brentwood.

An affirmation by this Court of the underlying Sixth Circuit holding will impede the ability of the Small Independents to provide extracurricular athletics as part of an effective and holistic education. It will impede that ability not only in athletics but in all extracurricular activities, including, e.g. forensics, music, and debate. The Small Independents have remained vigilant in maintaining the appropriate balance between academics and athletics for their students. To further that desire, they *voluntarily* joined the TSSAA because that association provides a structure for interscholastic athletics that is properly aligned with the goal of maintaining such a healthy balance for students. TSSAA's voluntarily-promulgated rules and regulations, particularly those against unregulated or unlimited recruiting of the child athlete, provide the framework in which the Small Independents can holistically educate their students, offer them a viable athletic program, and at the same time maintain the integrity of their academic communities.

If allowed to stand, the Sixth Circuit's decision will have an adverse impact on the ability of the Small Independents to continue to provide this environment which nurtures and teaches the whole child - - the athlete and the academic - - because the TSSAA will be forced to exclude all private schools from its membership. Small Independents will then not only face increased costs, but also the possible elimination of sports and other programs due to these costs. Perhaps most importantly, they will lose the ability to provide invaluable interaction between diverse public and private school students. The Small Independents respectfully submit this brief to the Court to present and protect their substantial interests in seeing that TSSAA membership (as well as membership in similar interscholastic organizations throughout the United States) remains open to private schools - - such as the Small Independents - - and their students.

SUMMARY OF ARGUMENT

Athletic competition through the TSSAA is critical to the total educational needs of students at the Small Independents. Should this Court affirm the current decision of the Sixth Circuit, recruiting of students for athletics, forensics, vocal competitions, band, fine arts, and other vital extracurricular educational activities will begin as early as the fifth grade. Such recruiting will result in an undue influence that dramatically affects not only the educational interests of preadolescent children but also those of their families, athletic peers and fellow classmates.

The TSSAA is a voluntary association of public and private schools with the members promulgating regulations and rules. A school which voluntarily agrees to abide by the rules of an interscholastic association must not then be allowed to sue that association for alleged violations of First

Amendment speech, in particular non-protected recruiting speech for athletic gain. If this Court allows that scenario to stand by upholding the Sixth Circuit's decision, the educational goals of the Small Independents, and those of similar institutions throughout the land, will become unattainable.

Affirmation of the Sixth Circuit decision will result in a scenario where the dual participation of public schools and the Small Independents in TSSAA Division I competitions will cease. The interaction between students from multiple and various socioeconomic backgrounds which is created by Division I competitions will likewise cease or at best, seriously diminish. Student athletes will no longer be able to observe and interact with children from other communities, neighborhoods and backgrounds on the athletic field, and the ability to develop respect and interaction among students and families from diverse areas will be severely curtailed. Separation of public and private divisions of the TSSAA will expose children, coaches, faculty, and families of the Small Independents to increased travel and expense as public schools will exclude the Small Independents from their athletic schedules. Increased travel commitments will result in inordinate amounts of time for students, coaches and faculty away from their regular classroom learning environments. Such a scenario will affect not only the student and faculty attending the event, but the non-athlete remaining in the classroom as well.

Open recruiting will place undue influence on children at tender ages. The decision to allow students with exceptional talents in forensics, vocal events, band, the thespian arts, and athletics to be recruited in their formative tender years is anathema to the balance that the Small Independents seek for their students. Schools with a large athletic budget will have

an unfair advantage in the recruitment of students, and competitive equity will suffer as the TSSAA has historically classified schools according to enrollment levels; a procedure not uncommon in interscholastic extracurricular associations throughout the country.

The above-delineated negative effects on children and student athletes will go far beyond the playing field into all areas of school life where there is healthy competition between schools and students. All interscholastic extracurricular activities will face a future without the organizations which allow them to compete with other schools and particularly with public schools. All students of the Small Independents, whether athletes or not, will be barred from or severely limited in acquiring a healthy, wide-ranging education with varied and diverse interaction with their peers throughout Tennessee, and in the final analysis, this effect on interscholastic activities will flow throughout the country.

ARGUMENT

I. Affirmation of the Sixth Circuit Court of Appeals decision will result in the division, if not dissolution of the TSSAA athletic structure into separate public and private school entities.

The TSSAA provides a framework under which public and private schools may compete against one another under the same agreed-upon rules. The TSSAA's viability as an interscholastic association for both public and private schools is heavily dependent on its ability to effectively maintain an equitable "playing field" between its public and private school members. The Sixth Circuit's decision substantially threatens the equitable coexistence between TSSAA's public and private school members because it effectively opens the door for the

private schools to challenge through litigation the TSSAA's rules whenever one of them disagrees with the manner in which the rules are enforced. Public schools, which do not have legal standing to file constitutional claims in the same manner as the private schools, will be left standing alone in the TSSAA.[4]

The disparate balance between the public and private schools that would result from the Sixth Circuit's decision will place too great a strain on the TSSAA's ability to include private schools as members. The TSSAA could not afford to subject itself to constant and protracted litigation initiated by disgruntled private school members over enforcement of its rules. The public schools, which comprise over 80% of the TSSAA's total membership, will be forced to either completely dissolve the TSSAA as it now exists or to exclude private schools from TSSAA membership. Under either scenario, a complete separation between private and public schools in interscholastic competition will likely result.

If a split occurs between public and private schools in interscholastic competition, the Small Independents stand to lose more than either the public schools or the more affluent private schools such as Brentwood. Unlike the more affluent private schools in TSSAA's Division II, the Small

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[4] See *Triplett v. Tiemann*, 302 F. Supp. 1239, 1242 (D. Neb. 1969) (holding that public school districts are not legally subject to injury under the Fourteenth Amendment because it has no application to actions by a state against its political subdivision) and *South Macomb Disposal Auth. v. Township of Washington*, 790 F.2d 500, 505 (6th Cir. 1986) (a political subdivision of a state cannot challenge the constitutionality of another political subdivision's ordinance on due process and equal protection grounds).

Independents compete in the same division as public schools.[5] Consequently, the majority of the schools that comprise the sports schedules for the Small Independents' athletic teams are local area public schools, and many relationships and rivalries have been forged between the Small Independents and these public schools over the years. If a public-private split occurs, the Small Independents will lose the invaluable tangible and intangible benefits derived from competition with local public schools.

A. TSSAA membership provides a vital link between public and private school children.

Small Independents maintain an essential connection to local area public schools that they would not have without TSSAA membership. In most cases, the athletic field is the only field of interaction between students of the Small Independents and public schools. The Small Independents have no desire to educate their students in a vacuum where they are virtually isolated from the majority of students in their community. An integral part of any child's education is learning how to interact and communicate with individuals from different backgrounds. If the link that TSSAA membership provides between public and private schools is severed, children from both public and private schools will lose opportunities for developing respect and appreciation for talents, lifestyles and challenges that have developed in arenas different from their own.

On a more general level, a public-private split will only enhance the isolation of some communities along with the attendant negative consequences such isolation entails.

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[5] See footnote 1.

Animosity and mistrust invariably result from the segregation of communities, especially along socioeconomic lines. The mission common to all schools, both public and private, of educating children to be well-serving members of their community will be encumbered if students are exposed only to children from similar backgrounds. Maintaining a forum such as the TSSAA for the interaction of children from multiple and various backgrounds is important for building strong communities and should be preserved at all costs.

B. Separation of public and private schools in interscholastic competition will expose the Small Independents and their students, coaches, and other faculty members to substantial financial and academic burdens.

In addition to the harmful effect of losing social interaction with public schools, the Small Independents will also suffer significant tangible consequences that will result from a split between public and private interscholastic associations. In the event the TSSAA either dissolves as it now exists, or excludes private schools from membership, the Small Independents will be confronted with two options: (1) remain independent and schedule competition with other schools as they can on a limited basis, or (2) join with a "private-only" athletics association. The Small Independents are all located in the southeastern region of Tennessee, an area where there are too few private schools of similar nature in the local communities to fill the Small Independents' sports schedules. If the Small Independents are not able to compete against local public schools, they will be forced to schedule private schools from other regions of the state in order to fill their schedules.

Athletic schedules with a substantial number of "out-of-town" teams will place a significant financial burden on the Small Independents to maintain viable athletic programs. For some Small Independents, the estimated increase in mileage for its athletic teams will be fourfold. Factoring in transportation, lodging and meals for their teams on the road, it costs the average Small Independent approximately $10.00 per mile. For perspective, in order for a Small Independent in Chattanooga to play football with another private school in Knoxville, the nearest region where other private schools can be found to play, the team must travel 224 miles round-trip for approximately four hours. The cost of making a trip to Knoxville for a Small Independent football team is approximately $2,240.00. A trip to Nashville is a 270 mile round-trip and takes more than four hours. The cost of making a trip to Nashville for a Small Independent football team is roughly $2,700.00.

These figures include the cost of travel for the team and coaches, but there is the added expense that is incurred by the families of the student athletes and coaches in traveling to support the teams. The figures reflect how costly just *one* trip would be to either Knoxville or Nashville for a Small Independent football team in Chattanooga. If a Small Independent in Chattanooga can no longer participate in the TSSAA, it will be forced to schedule multiple out of town games every season with teams from either Knoxville, Nashville, or even Memphis which is a 690 mile round trip to western Tennessee. Under this travel scenario, the financial burden of the Small Independents to maintain athletic teams will be considerable and perhaps prohibitive.[6]

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[6] These schools offer a variety of sports for both boys and girls including cross county, basketball, baseball, softball, volleyball,

In addition to the increased travel expense that will result from competing with schools from distant locales, a substantial academic burden will be incurred as well. The absence of student-athletes and coaches will be more frequent and for longer periods of time. In one of the Small Independents, more than 70% of the student body is involved in extra-curricular activities. This means that 7 out of 10 of its students will be absent from school much more frequently and at times for multiple days. Increased absence of coaches adversely affects the students who do not participate in athletics as well, because these coaches are generally teachers at the Small Independents. In addition, the non-coaching teachers' responsibilities to "catch-up" the absent student-athletes will increase. Consequently, the quality of instruction and material covered in the classroom will decrease. The increased academic burdens on all of the students will make it harder for the Small Independents to justify maintaining athletic programs if they come at the expense of their academic missions. Membership in the TSSAA, and thus the ability to compete against local area public schools, is the most viable way for the Small Independents to offer athletic opportunities to their students without sacrificing the academic welfare of all their students, teachers, and families.

II. Affirmation of the Sixth Circuit Court of Appeals decision will result in unregulated recruiting of middle school children for athletics and other extracurricular activities.

The Small Independents recognize the unique benefits of athletics and other extracurricular activities. Competition in

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soccer, tennis, among others. Travel costs alone would jeopardize the continued viability of these sports.

athletics is often the most effective way to teach lessons such as teamwork, organization and management of pressure. However, the Small Independents are also concerned with maintaining the appropriate balance between athletics and academics and utilizing athletics as an educational tool. To this end, the Small Independents joined the TSSAA which provides a structure for interscholastic athletics that is properly aligned with their goals and objectives in providing healthy athletic opportunities for their students.[7]

The TSSAA and similar organizations are voluntary organizations and their rules, such as those against unlimited recruiting of student athletes, are voluntarily promulgated and adhered to by members because the members agree that unlimited and unregulated recruiting of student athletes is harmful to students and thus not acceptable. If these rules are allowed to be challenged and subverted at will by voluntary member schools, such recruiting will become the de facto state of affairs in secondary school athletics. It will completely undermine the purposes and objectives of the Small Independents for joining the TSSAA, as it will inevitably lead to the subordination of academics to athletics, competitive inequities, and the disruption of social harmony in the schools. If agreed-upon constraints against recruiting for athletic purposes are not upheld, then all TSSAA member schools fail to protect their students from entering the culture of athletic obsession at too young an age. The danger also exists that unlimited recruiting will spread from the athletic realm and eventually infect other extracurricular activities in

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[7] The TSSAA offers its members a dependable program for joint and mutual athletic competition as well as educational programs for coaches, catastrophic insurance for the student athletes, and the opportunity to compete in championship games which it sponsors.

which schools compete such as forensic, vocal, band, and artistic competitions.

A. Unlimited recruiting will lead to the exploitation of children and to the subordination of academic development to athletics.

If a child is recruited to play basketball or soccer when he is in the fifth grade, no positive impact can result for the child or the school. We need look no further than the real life examples regarding the harmful effects of recruiting that are prevalent in major college athletics today.[8] The harmful effects experienced by high school graduates being recruited by colleges will be amplified for the middle and grade school child who is going through the most important formative years of his or her life. Exploiting a child at such a young age sends the wrong message: that the value of an individual should be measured by the amount of his or her athletic ability.

From an academic standpoint, recruited child athletes have pressure to perform on the field and to live up to the expectations placed upon them. It is only natural that immense pressure to perform athletically will significantly dictate what priority a student places on athletics in relation to academics. When a student is recruited aggressively as a fifth grader, the temptation to place athletics over academics will be well-nigh impossible to resist for that child.

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[8] See Brief of *Amicus Curiae* National Federation of State High School Associations in Support of the Petition for a Writ of Certiorari at 8-10, *Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad.*, (No. 06-427), for concise and informative explanation of harms caused by unlimited recruiting in intercollegiate athletics.

B. Unregulated recruiting will adversely affect the educational environment for students at the Small Independents.

Perhaps the most damaging result of unregulated recruiting is the negative impact it will have on the social climate of a school. In the smaller and more intimate environments which exist at the Small Independents, a positive environment where the class sizes are very small and the students all know each other relatively well is the norm. Recruiting under this scenario will have an adverse impact on the relationships between recruited athletes and other non-athletic students. Such social disruption will injure the constructive social environments found at the Small Independents. Recruited child athletes can develop a false sense of superiority over others from the extra attention they receive at early ages. This distorted sense of superiority will stress their relationships with their parents, siblings, peers, and teachers. Non-athletic students may experience feelings of resentment and inadequacy if their achievements are not adequately recognized. Moreover, the opportunity to participate in athletics will be closed to those less talented than the recruited athletes but who wish to participate in school athletics, subverting the very purpose of offering athletics as an educational experience.

Unregulated recruiting and the resulting increased pressure to win will also have a negative impact on the ability of teachers and coaches to properly perform their duties. Teachers may feel subtle pressure to maintain the eligibility of a star athlete and grade him or her less stringently. Coaches will also feel compelled to subordinate their obligations as teachers to their coaching duties.

The negative effects of such recruiting have the potential to injure the social climates of all schools, not just the Small Independents. If allowed to pervade the realm of interscholastic athletics, the educational missions of all schools will be undermined and subverted from their stated objectives and goals. The responsibility to prevent unlimited recruiting lies with all who have an interest in maintaining healthy academic and social environments in which children are educated.

C. Unlimited recruiting will result in the loss of competitive equity between the TSSAA member schools.

Competitive equity is essential in allowing the Small Independents to promote fairness, sportsmanship and respect for others among their students. Without competitive equity, students will be less willing to participate in athletics or other competitions. Community support will decrease, and the very objectives for providing athletic opportunities for students will be frustrated. The invaluable benefits that athletic competition provides for children can only be realized if the competition remains fair and equitable between its participants.

A primary objective of any TSSAA-type association organized for competition is this maintenance of competitive equity between participants. Specifically, the nature of TSSAA's structure is geared towards maintaining the competitive equity between the TSSAA 's public and private school members.[9] The TSSAA also promulgated its limited

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[9] See footnote 1. The TSSAA's divisional classifications are determined according to the enrollment number of member schools

recruiting rules in part to compensate for the disadvantages that public schools naturally have relative to private schools. Unlike the private schools, public schools are restricted to their school districts to obtain students and student athletes. Also, affluent private schools often have better athletic facilities than the public schools because they benefit from alumni and other raised funds. Without the TSSAA's rules that limit recruiting, private schools would be able to unfairly recruit student athletes or other interscholastic "stars" away from the public schools with little restraint.

Public schools are not the only beneficiaries of the rules limiting recruiting. Unregulated recruiting will adversely affect the competitive equity between the Small Independents and the more affluent private schools which have substantially larger budgets for their athletic programs. The more affluent schools have the ability to offer more financial aid and better athletic facilities to entice student athletes to enroll at their schools. The Small Independents simply do not have the money, desire, or goal to recruit children in the same manner as some of the more affluent private schools. The protections that the TSSAA rules afford the Small Independents against unregulated recruiting may well disappear in a "private-only" association. The inequities between the Small Independents and the more affluent private schools with whom they would

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in order to ensure that small schools are not unfairly placed in a division with large schools. For example, within Division I football classifications, both public and private schools compete in one of five sub-divisions (1A-5A), with 5A being the division for the largest schools and 1A being the division for the smallest schools. TSSAA has also imposed a 1.8 "multiplier" to private schools in Division I which, in effect, differentiates private and public schools of similar enrollments. This number is then applied to determine under which classification the private school falls.

be forced to compete at that point for athletes would only be exacerbated. Some competition to obtain good students and excellent athletes is realistic and perhaps even desirable. However, a free-for-all environment of unlimited recruiting creates an insurmountable gap between the more affluent private schools and everyone else in athletics and other interscholastic competitions.

III. The Tennessee Secondary School Athletic Association is a voluntary association of public and private schools.

A crucial factor to this Court's ultimate decision is that the TSSAA is a *voluntary* association made up of public and private schools. Each school has the opportunity to join the TSSAA, and if it so chooses, to withdraw from the association. The members contractually agree to follow by-laws as well as rules and regulations promulgated by the membership. Each member of the TSSAA has an opportunity to participate by vote and representation through the TSSAA Legislative Counsel and Board of Control on rulemaking decisions. The rule limiting athletic recruiting of student athletes is one promulgated by the very association of which Brentwood and all other school members of the TSSAA are members. Stated differently, Brentwood and the other TSSAA member schools, including the Small Independents, have voluntarily placed themselves under the aegis of the limited recruiting rules.

Essentially each member school has entered into a voluntary contract with the TSSAA in order to implement rules and regulations for interscholastic athletic competitions. The by-laws provide for (1) notification by the TSSAA to the member of any alleged violation of the rules, (2) hearings on same, and (3) an appeals process. Again, these by-laws were

promulgated by the member schools which include Brentwood. The regulations of the TSSAA, as well as their enforcement, teaches students the lessons of respect for structure and authority, discipline to follow the rules, and honor in accepting the penalties for violating them. Students learn that life may not always appear fair, and that sometimes their actions will be criticized but that they can accept the results graciously and according to the rules.

All students and their families reasonably believe that if their school is a member of the TSSAA, they can be assured that school athletic events will occur on as fair and balanced a playing field as is possible. These students and families believe that the less talented athlete will have the opportunity to play under the TSSAA, and that the school's competition will be varied and intense; sometimes they will lose and sometimes they will win, but they will always have a fair opportunity to win or lose.

The underlying decisions should not stand; allowing a school which voluntarily agrees to abide by the TSSAA's rules and regulations to sue the association for alleged violations of its free speech rights under the First Amendment will render the raison d'etre of interscholastic extracurricular associations moot. Such a result is particularly egregious when the speech is non-protected recruiting for athletic gain.

CONCLUSION

The TSSAA is a voluntary organization comprised of public and private schools that fosters a dependable program for joint and mutual athletic competition. The very purpose of athletic competition is to promote fairness, respect, discipline, and honor. Should this Court allow the Sixth Circuit decision to stand, high school athletic competition will

be permanently altered and harmed to the detriment of the ultimate beneficiary, the high school student. Unlimited recruiting of children athletes is contrary to the goals of secondary school institutions, and certainly contrary to the goals of the *Amici* now before this Court.

The impact of the prior decisions go far beyond athletic competition. As Justice Thomas stated in the dissent of this Court in *Brentwood I*, many other organizations that ". . . foster activities, enforce rules, and sponsor extracurricular competition among high schools – not just in athletics, but in such diverse areas as agriculture, mathematics, music, marching bands, forensics, and cheerleading" will be affected. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 314 (2001) (Thomas, J., dissenting).

For the reasons set forth, the *Amici* request that the judgment below be reversed.

DATED: February 20, 2007.

Respectfully submitted,

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No. 06-427

In The Supreme Court of the United States

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION,

Petitioner,

v.

BRENTWOOD ACADEMY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF *AMICI CURIAE* BRENTWOOD ACADEMY PARENTS, HARRY ALLAN, MICHAEL BLALOCK, SCOTT BROWN, LOUIS BULLARD, WALLY KNOX, MILBREY GANICK, JOHN SLAUGHTER, AND MICHAEL VAUGHN IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI*[1]

Amici curiae Harry Allan, Milbrey Ganick, and John Slaughter are parents of Brentwood Academy graduates and of sons who received the letter that initiated the events that led to this litigation. *Amici* Mike Blalock, Scott Brown, Louis Bullard, Wally Knox, and Michael Vaughn are parents of children who currently attend Brentwood Academy. All of the *amici* share interests in promoting the exchange of information between schools and the parents of students and of potential students. Full information is essential in selecting schools and in overseeing children's education. Restrictive rules concerning the initiation of contact with high school students and rising high school students interfere with schools' ability to provide full information to a wide spectrum of parents. *Amici* also share an interest in supporting and promoting the development of Brentwood Academy, which is adversely and substantially affected by unnecessarily harsh restrictions on recruiting students. The school is especially disadvantaged by Tennessee's existing recruitment policies in attracting to Brentwood qualified students from lower socio-economic status, a fact which hampers its ability to build and maintain a diverse student body.

SUMMARY OF ARGUMENT

The First Amendment does more than protect the rights of speakers and the press. It also confers on listeners and readers a right to receive information; the Amendment bars unwarranted governmental interference with the dissemination of information that drives markets.

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[1] This *amici curiae* brief is submitted with the consent of all parties in this action. Letters to that effect have been filed with the Court. No counsel for a party authored this brief in whole or in part.

"The general rule is that the speaker and the audience, not the government, assess the value of the information presented." *Edenfield v. Fane*, 507 U.S. 761 (1993). This principle has special force in the education market, where the decisions are so critical and so complex. That market today offers parents a wide range of choices in picking a school for their child. The parents need information from schools in making their selection and in learning about educational opportunities after the selection is made. Schools, too, need to reach out to parents. The outreach is especially critical for the schools to identify and attract low income students, who are unlikely to inquire or learn about the range of school options. Private schools depend upon recruitment to attain diverse student bodies. TSSAA's[2] recruitment rule seriously impairs the flow of useful information from schools to parents, students, and potential students.

The Sixth Circuit determined that intermediate scrutiny should apply. Assuming that is the standard, the TSSAA's action in this case cannot satisfy it. The standard holds that the Association must demonstrate that its discipline of Brentwood Academy was narrowly tailored to promote a significant interest and left open adequate alternative channels. Three interests were advanced by TSSAA to support its action: protecting students from exploitation and harassment, preventing athletics from dominating academics, and maintaining competitive equity. Even if those interests are significant, the disciplining of respondent's speech in this case did nothing to promote them. That speech included a letter and a follow-up phone call. The letter informed students who had

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[2] This brief refers to petitioner Tennessee Secondary School Athletic Association as "TSSAA," "the Association," or petitioner.

already committed to attend Brentwood Academy in the fall that spring football practice was about to begin and that they were invited to attend. Their participation in the practices was permitted by TSSAA rules. The phone call that ensued was to reassure parents that their sons' participation in the practices was voluntary. No reasonable person can conclude that two contacts to contracted families conveying information about a legitimate school activity, which the students would not otherwise have known about, could implicate any of the asserted state interests.

The Association fails in its attempts to characterize this case as one akin to those involving government grants or public employees. This case does not concern conditions attached to government funds. The TSSAA here has purchased nothing from the school, has not bestowed any grant on it, and has not underwritten any school activity. In the same vein, the TSSAA does not direct and pay the schools, as it does with its employees, to conduct its business or execute its programs. Rather, the TSSAA creates and enforces regulations that govern the state's high school athletics, in general, and communications between schools and potential students, in particular. The Association acted in this case as an enforcer of its recruitment rule. The validity of its action is accordingly governed by decisions such as those in which professional boards have enforced rules of conduct against exercises in speech. *E.g.*, *Edenfield*, *supra*; *Shapero v. Kentucky Bar Assn.*, 486 U.S. 466 (1988). Under the rubric of those decisions, it is clear that the state may not punish the unobtrusive communication of accurate information about a lawful activity.

The district court found in this case that the TSSAA disciplined Brentwood Academy because of the content of

its communications. Thus, in order to sustain that discipline, TSSAA must show that it was necessary to achieve a compelling state interest or that the speech was categorically punishable. *E.g.*, *Texas v. Johnson*, 491 U.S. 397 (1989); *Cohen v. California*, 403 U.S. 15 (1971). The speech in question was clearly within protected speech, and for the same reasons the TSSAA could not satisfy intermediate scrutiny, it fails to meet strict scrutiny.

For the reasons stated in the brief of *amicus curiae* Association of Christian Schools International, the recruitment rule is unconstitutional on its face. The rule is particularly officious in its restrictions on schools' ability to initiate personalized contact with potential students. Those restraints especially burden the schools' ability to attract qualified students from low income families. That, in turn, means that most low income families will not receive the information they need to make informed education decisions.

ARGUMENT

I. TSSAA'S RECRUITMENT RULE UNREASONABLY IMPAIRS THE FLOW OF VALUABLE INFORMATION TO PARENTS AND STUDENTS.

TSSAA's interpretation of its recruitment rule, as demonstrated by the particular facts in this case, does more than restrict the freedom of speech of Brentwood Academy ("Brentwood") and its agents. The Association also seriously deprives potential students (including those who have signed contracts to enroll and paid their deposit) and their parents of information that they need to make educational choices and to make the most of

their educational experience. As such, the rule constricts valuable First Amendment rights of that audience.

"Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both." *Virginia St. Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976). This Court accordingly ruled that the Virginia Pharmacy Board could not constitutionally keep from prescription drug consumers information they needed to make informed decisions in buying drugs. Virginia's law prohibiting pharmacists from advertising "any amount, price, fee, premium, discount, rebate or credit terms"[3] for any prescription drugs violated consumers' First Amendment rights. "If there is a right to advertise, there is a reciprocal right to receive the advertising, and it may be asserted by these appellees." *Id.* at 757. The Court reasoned:

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered.

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[3] 425 U.S. at 750, *quoting* Va. Code Ann. § 54-524.35(3).

Id. at 765 (internal citations omitted).[4] To be sure, Brentwood's speech in this case was not commercial speech.[5] The principle, however, of the need for a free flow of information for markets to work applies with equal (or greater) force in the context of making educational choices. As Brentwood's expert Dr. James Guthrie said in speaking about that very context, "Markets can't operate, or at least they can't operate efficiently, unless those who come to the market with products and services and those who come to the markets seeking products and services are well-informed." Trial Transcript ("Tr. Tr.") at 837.

This Court has consistently sustained the right to receive information and has done so in a variety of contexts. *Lamont v. Postmaster General*, 381 U.S. 301 (1965), for example, invalidated a postal regulation that burdened

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[4] More recently, the Court in *Edenfield v. Fane*, 507 U.S. 761 (1993), found unconstitutional Florida's ban on certified public accountants' initiating contact with potential clients and soliciting their business. The Court explained:

> In denying CPA's and their clients these advantages, Florida's law threatens societal interests in broad access to complete and accurate commercial information that First Amendment coverage of commercial speech is designed to safeguard. The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented.

Id. at 766 (citations omitted).

[5] That is, conveying information about spring football practice in no way "proposed a commercial transaction," identified a commercial product or service, or promoted Brentwood's economic interests, which are the critical factors in this Court's definition of commercial speech. *E.g., City of Cincinnati v. Discovery Network Channel, Inc.*, 507 U.S. 410, 422-23 (1993); *Bolger v. Youngs Drug Products*, 463 U.S. 60, 66-67 (1983).

citizens' rights to receive certain political publications from foreign sources. Similarly, in *Kleindienst v. Mandel*, 408 U.S. 753, 762-763 (1972), the Court held that, although an unadmitted nonresident alien could claim no right to enter the country to conduct a lecture tour, professors who wanted to bring him here to hear and debate him could assert a First Amendment right to challenge his exclusion. Their claim was "the right to receive information and ideas." *Id.* at 762, *quoting Stanley v. Georgia*, 394 U.S. 557, 564 (1969). Even if prisoners lose a good portion of their expressive freedoms when they become incarcerated, prison censorship of their mail nevertheless implicates the First Amendment because their addressees have a right to receive unfiltered correspondence from the prisoners. *Procunier v. Martinez*, 416 U.S. 396 (1974); *see also, e.g.*, *Marsh v. Alabama*, 326 U.S. 501, 505 (1946); *Thomas v. Collins*, 323 U.S. 516, 534 (1945); *Martin v. Struthers*, 319 U.S. 141, 143 (1943). Recognition of this "right . . . to acquire useful knowledge" has a venerable place in constitutional law. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

The record in this case establishes the importance of the free flow of information for schools, parents, and students in making educational choices. Choices abound in education today more than ever; the proliferation of private schools, charter schools, magnet schools, vocational schools, and liberal public school transfer policies now provide families with an array of options. *McFarland v. Jefferson County Bd. of Educ.*, 330 F. Supp. 2d 834 (W.D. Ky. 2004), *aff'd*, 416 F.3d 513 (6th Cir. 2005) (describing wide range of parental choices in a public school system), *cert. granted sub nom. Meredith v. Jefferson County Bd. of Educ.*, ___ U.S. ___, 74 U.S.L.W. 3676 (June 5, 2006); *Brentwood*

Academy v. Tennessee Secondary Sch. Athletic Assn., 304 F. Supp. 2d 981, 989, 991 (M.D. Tenn. 2003).[6] The No Child Left Behind Act mandates that low performing public schools provide, at the state's expense, alternative schooling for any requesting students. 20 U.S.C. § 6316(b)(1). School choice promotes competition among schools to keep and retain good students, and that, in turn, enhances the quality of schools. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 644-48 (2002). Diverse choices enable parents to find a school that suits their values and their child's needs.[7] As a consequence, making choices becomes increasingly difficult. "Education is a complicated business," Professor Ellen Goldring explained, "and [choosing a school is] a very important decision. And obviously . . . families [can't][8] make good decisions about the best fit, what their child needs and where their child can be most successful[,] if they don't have access to good information." JA-304.

Critical to this educational decision-making process is the ability of a school to reach out to families to inform them of its existence, emphases, qualities, and philosophy. *E.g.*, JA at 359 (Testimony of James Guthrie). Attracting students is essential not only for a school's economic well-being, in terms of having a sufficient number of students to meet budgetary needs, but also to ensure the diversity

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[6] Plaintiff's expert and Peabody Professor of Education Ellen Goldring also described the recent developments emphasizing and expanding parental choice in education. Tr. Tr. 323-29.

[7] Several parents testified in this case that they selected Brentwood Academy for their child because of the school's tripod approach to education – developing academic, athletic, and spiritual qualities – and because it best suited their child. *E.g.*, Tr. Tr. 471 (Testimony of John Slaughter); Tr. Tr. 761-62 (Testimony of Harry Allan).

[8] The record states that the witness said that "families can make good decisions" without good information, but it is apparent from the context that the "can" was an error and that it should have read "can't."

that is so vital to education. JA-308-09 (Testimony of Ellen Goldring); JA-354-58 (Testimony of Michael Obel-Omia); JA-359 (Testimony of James Guthrie); *see, e.g., Grutter v. Bollinger*, 539 U.S. 306 (2003). The need to reach out is particularly acute in the recruitment of students from families of middle and lower socio-economic status ("SES"). Professor Goldring explained that such families are not in social networks where they can learn through personal contacts about educational choice, and they are not nearly as likely to seek out information about the availability of private alternatives. JA-305-06. As one mother succinctly stated, "If you're not in the market for a used car, you're not going to look at the classified ads." JA-306 (Testimony of Ellen Goldring). Without a recruitment process, talented children in those families are not nearly as likely to be informed about scholarship opportunities.

According to Michael Obel-Omia, teacher and admissions director at Roxbury-Latin in Boston, the best way to reach lower SES families is "[t]hrough personal contact. It's my going out and visiting these families, visiting their schools, seeing them, talk[ing] to them, explaining who we are, sharing Roxbury-Latins's story. That is the most effective way. As I noted on the cards that we have at open house, most kids that come, the majority of them come, check off that they met me." JA-356-57. In the absence of such efforts, meaningful school choice for children in middle- and low-SES ranges is not an option. As a consequence, if private schools like Brentwood cannot use proactive and personalized methods to attract such students, they are severely handicapped in attaining a diverse student body.[9]

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[9] Professor Guthrie explained that private schools have to work harder than public schools to achieve diversity, they have to engage in

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TSSAA's recruitment rule stifles considerable speech that families with school age children would otherwise receive and ought to receive. While no one would contest the need for rules to prevent what is, in fact, coercion or harassment in recruiting, the interpretation that the TSSAA has given to its rule means that many students, and student athletes in particular, will be deprived of educational opportunities because they do not know about them.

The facts in this case illustrate how the recruiting rule can interfere with families' rights to receive news about a school. TSSAA allowed incoming students to participate in spring football practice. If Coach Flatt (or someone at his direction) had not contacted the twelve families, their sons would not have known about the opportunity to join in the practices and, obviously, could not have taken advantage of the opportunity. Parents and students – whether the latter are potential students, already committed students, or enrolled students – have a need and a "right . . . to acquire useful knowledge" about available educational opportunities. *Meyer, supra*, 262 U.S. at 399. As shown below, the TSSAA cannot sustain the arbitrary manner in which it has interfered with that right.

"almost door to door salesmanship. This is Fuller Brush salesmanship, this is knocking on doors, going into low income neighborhoods, finding out where under-represented students live or play, talking to their parents, trying to get into their churches, trying to get into the social activities in which they engage, and explain to them that there are choices from which their children might benefit. . . . It is recruiting." JA-359.

II. APPLICATION OF TSSAA'S RECRUITMENT RULE TO BRENTWOOD ACADEMY'S EXPRESSION WAS NOT NARROWLY TAILORED TO ADVANCE A SIGNIFICANT GOVERNMENTAL INTEREST.

On remand from this Court's ruling in *Brentwood Academy v. Tennessee Secondary Schools Athletic Assn.*, 531 U.S. 288 (2001), the Sixth Circuit characterized the action taken by the TSSAA against Brentwood as a content neutral application of the recruitment rule. That court therefore concluded that TSSAA need satisfy only an intermediate level of scrutiny to sustain its case. 262 F.3d 543, 553-54 (6th Cir. 2001). Assuming that is the applicable standard,[10] TSSAA fails it.

To survive intermediate scrutiny, the government must demonstrate that its rule or action is narrowly tailored to achieve a significant governmental interest and leaves open adequate alternative channels of expression. *E.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Perry Educ. Assn. v. Perry Local Educators Assn.*, 460 U.S. 37, 45 (1983). TSSAA invokes three interests to support its case: protecting students from exploitation and harassment, preventing athletics from dominating academics, and maintaining competitive equity. Even if those interests are significant, the application of the recruiting rule to Brentwood's expression in this case failed to promote them.

TSSAA disciplined Brentwood for a letter and a phone call to twelve students. Coach Flatt's letter was an

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[10] Part IV, *infra*, explains that TSSAA disciplined Brentwood because of the content of its expression and that that discipline must consequently be measured by strict scrutiny.

unobtrusive means to inform incoming students about the existence and nature of the impending spring practice, which they would not otherwise have known about. The follow-up telephone call clarified that the practices were strictly voluntary. Passing on truthful, nonmisleading information about a lawful activity, this Court has held, is constitutionally protected speech. *E.g., Greater New Orleans Broadcasting Association, Inc. v. United States*, 527 U.S. 123 (1999); *44 Liquormart, Inc. v. State of Rhode Island*, 517 U.S. 484 (1996); *see also, e.g., Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (truthful disclosures of lawfully acquired information may not be punished absent a necessity to promote an overriding state interest); *Cox Broadcasting v. Cohn*, 420 U.S. 469 (1975) (same). Thus, unless the manner or means of the expression in this case imperiled the State's interests, the communications could not be subjected to adverse governmental treatment.

Making that point virtually decides this case. A brief letter and a clarifying phone call cannot by any stretch be considered exploitive or harassing.[11] Several parents of students who received the letter testified in this case that they found nothing inappropriate, threatening, harassing, coercive, or harmful in the letter, but they did state that they appreciated being informed about the practices.[12] *E.g.*,

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[11] That obvious fact contributes to the inference that it was really the contents of the letter that provoked the TSSAA. If so, then intermediate scrutiny is not the appropriate analysis. Strict scrutiny is. *See* Part IV, *infra*.

[12] *See also* the testimony of Peabody/Vanderbilt Professor David Guthrie:

> I don't see anything within the context of this letter which is exploitative of students. . . . [T]he obverse of this letter is what's undesirable: The absence of communication. . . . [O]nce a student and his or her family make a commitment

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JA-324-25 (Testimony of John Slaughter); JA-350-51 (Testimony of Milbrey Ganick); JA-352 (Testimony of Harry Allan); 304 F. Supp. 2d at 990-91. Because the TSSAA allowed incoming eighth graders to participate in spring football drills, it can hardly claim that telling those students about the drills put athletics above academics. Nor is it rational to conclude that the letter and phone call implicated the interest in maintaining competitive equity.[13] These were students who had already decided to attend Brentwood, they had a right to participate in the spring practices, and they had previously expressed the desire to play football at Brentwood. Moreover, public high schools under TSSAA's feeder schools exception were entirely free to contact their incoming eighth graders to inform them about spring practice. How could "competitive equity" be promoted by prohibiting one set of schools from providing individual notice about practices while not allowing another set to do so?

TSSAA argues that it is "entitled" to enforce its athletic rules without scrutiny of a rule's particular applications. It is a novel argument. This Court has held, as petitioner notes in its brief at 37, that a rule can be applied to particular facts even though the harms at which the rule is aimed did not, in fact, ensue. *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978). In *Ohralik*,

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to a school, then I think the appropriate policy ought to be to maximize communication. Tr. Tr. at 853.

[13] Because the TSSAA in no way promoted fair competition by disciplining Brentwood for Coach Flatt's letter and phone calls, it is unnecessary for the Court to determine whether competitive equity is a significant governmental interest. If the Court does address the issue, it should affirm the Sixth Circuit's conclusion that the interest in this case was not substantial for the reasons stated by that Court. *Brentwood Academy v. TSSAA*, 442 F.3d 410, 426-27 (6th Cir. 2006).

however, the rule banning in-person solicitation by lawyers was applied to speech and to circumstances that clearly threatened the state's interests in preventing fraud and coercion. Ohralik was the classic ambulance chaser who had personally approached two 18-year old accident victims to convince them to hire him. One of them he visited on two occasions and while she was still in the hospital. By contrast, a companion case to *Ohralik* invalidated the application of a similar no-solicitation rule because it penalized speech that communicated useful information and did not threaten the state's interest. *In re Primus*, 436 U.S. 412 (1978). The solicitation there was made by letter and was not motivated by profit. Together, these cases say that the state may punish speech that presents a risk of the harm the state can legitimately prevent, but it may not punish speech that is devoid of such risk.

Similarly, the Court in *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469 (1989), encountered a university system rule that banned all solicitation in college dormitories. After finding that the circuit court had used the wrong standard, the Court remanded the case with instructions to determine, first, whether the rule was unconstitutional *as applied* to the speech in question – gatherings akin to Tupperware Parties – and, second, if it was constitutional, whether the rule as interpreted by the Board was facially unconstitutional. *Id.* at 484-86. The only difference between *Fox* and this case is that *Fox* involved commercial speech and this case involves noncommercial informational speech.

While it is true, as Petitioner states, that intermediate scrutiny does not command *least* restrictive alternatives, such analysis does take into account the degree to which the state regulation burdens more speech than is necessary. *E.g., Watchtower Bible and Tract Society of New York,*

Inc. v. Village of Stratton, 536 U.S. 150, 168-69 (2002); *City of Ladue v. Gilleo*, 512 U.S. 43, 58-59 (1994); *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 639 (1980). That is the essence of "narrow tailoring." In this case, by casting its anti-recruitment net so broadly as to ensnare a letter and a clarifying phone call to already-committed families about a lawful school activity, the TSSAA has burdened far more speech than is necessary to prevent exploitation of students, to keep athletics subordinate to academics, and to foster competitive equity.

III. NEITHER THE GOVERNMENT GRANTS NOR THE PUBLIC EMPLOYMENT DECISIONS ARE ANALOGOUS TO THIS CASE.

Both the TSSAA and the United States, in support of the petitioner, contend that this case should be governed by the doctrines developed in the context of executing government grants and contracts or of public employment. While it is understandable that the TSSAA would want to seize on the speech-restrictive aspects of those doctrines, neither context is analogous. The analyses put forward by the petitioner and the solicitor general are seriously flawed. They also fail to take into account the rights of parents like the *amici* to be informed about schools and about their activities.

A. The Standards Applicable to Government Grants and Contracts Do Not Apply.

Because Brentwood Academy at some point signed a contract, agreeing to abide by TSSAA's rules, and because it did so voluntarily, the TSSAA argues that those facts transform this case into one involving the administration of a governmental grant or contract.

Petitioner's brief points to decisions in which this Court has upheld conditions that Congress imposed on the receipt and use of federal funds. *Rumsfeld v. Forum for Academic & Institutional Rights*, 547 U.S. 47, 126 S.Ct. 1297 (2006); *United States v. American Library Association* ("*ALA*"), 539 U.S. 194 (2003); *Rust v. Sullivan*, 500 U.S. 173 (1991); *Grove City College v. Bell*, 465 U.S. 555 (1984). "Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that education institutions are not obligated to accept."[14] *Rumsfeld*, 547 U.S. at ___, 126 S.Ct. at 1306, *quoting Grove City*, 465 U.S. at 575. Undoubtedly, TSSAA could impose reasonable conditions on any funds that it distributes to member schools. That is not this case, however.

The distinction between imposing conditions on funding and imposing conditions on participation is both obvious and meaningful. Within broad limits, "when the government appropriates public funds to establish a program it is entitled to define the limits of that program." *Rust*, 500 U.S. at 194. In *Rust*, for example, the government essentially purchased a set of services; it bought family planning counseling, and the counseling it bought was that which did not include abortion as a family planning alternative. The government there was "simply insisting that public funds be spent for the purposes for which they were authorized." *Id.* at 196. Similarly, in *ALA*, the government decided to underwrite public libraries' provision of internet services "to help public libraries fulfill their traditional role of obtaining

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[14] Even under that relaxed standard, the recruiting rule as applied to Brentwood still cannot withstand invalidation. It is neither reasonable nor predictable to conclude that a ban on "undue influence" applies to Brentwood's speech in this case.

material of requisite and appropriate quality for educational and informational purposes." In doing so, Congress could insist that libraries use their federal dollars for that purpose.

In this case, the TSSAA has funded nothing, and Brentwood does not provide any programmatic services on behalf of the TSSAA. The Association has not purchased any services or speech from Brentwood. Rather, the TSSAA has asserted its regulatory authority over Brentwood and punished it for its expression. *See Brentwood* I, 531 U.S. at 291 (TSSAA is a corporation "organized to regulate interscholastic sport among the public and private high schools in Tennessee); *id.* at 299 (TSSAA fulfills schools' "need [for] some mechanism to produce rules and regulate competition"). The $3,000 TSSAA sought from Brentwood for the letters and phone calls was not for the recoupment of misspent public funds, it was a *fine*. Brentwood's speech in this case was not delivering the Association's message, was not implementing its program, was not delivering any service that the TSSAA had purchased or contracted for. Rather, Brentwood was simply communicating accurate information about a lawful school function to private individuals who were in privity with the school. TSSAA in this case was not functioning as a government speaker, purchaser, or underwriter; rather it functioned as an enforcer.

TSSAA stresses that Brentwood voluntarily joined the Association and, when it did, signed a contract to abide by the Association's rules. Given the school's tripartite educational philosophy melding together academics, athletics and the spiritual, given TSSAA's ban on member schools playing nonmembers without its permission, and given the district court's finding that "TSSAA is effectively the only game in town," 304 F. Supp. 2d at 997, whether Brentwood's entry was really "voluntary" is quite debatable. It is

also beside the point. Without question, TSSAA controls access in Tennessee to a very valuable arena – high school athletics. By its insistence that entry into that arena comes at the price of the surrender of constitutional rights, the TSSAA advocates nothing less than the reimposition of the long discredited right-privilege doctrine.[15]

There are numerous contexts in which individuals voluntarily submit themselves to the authority of a state entity, and agree to abide by that entity's rules, without conferring upon it the capability to create and apply those rules in ways that obliterate constitutional rights. Certainly, students who attend a public university freely choose to do so while also entering into a contractual relation with the school and agreeing to abide by its rules. Yet this Court has consistently applied traditional public forum and content distinction analysis to university efforts to restrain students' speech. Ronald Rosenberger voluntarily enrolled at the University of Virginia and voluntarily sought university funds to support his student group's religious publication. Nevertheless, this Court quite rightly held that the University's refusal to fund the publication, when it funded all other nonreligious and nonpolitical student publications, created a content discrimination that could only be sustained by satisfying strict scrutiny. *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995).

Similarly, this Court applied traditional First Amendment analyses to claims raised by the students in *Board of Regents v. Southworth*, 529 U.S. 217 (2000), who

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[15] For examples of cases rejecting that doctrine, *see Board of Regents v. Roth*, 408 U.S. 564, 571 (1972); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *see generally, e.g.*, William Van Alstyne, *The Demise of the Right-Privilege Doctrine in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

voluntarily attended the University of Wisconsin. Their challenge to the university's assessments for the support of student groups failed because that support was provided in a viewpoint neutral manner, but the students' challenge to a referendum procedure to determine funding or defunding of a particular group appeared suspect. "To the extent the referendum substitutes majority determinations for viewpoint neutrality it would undermine the constitutional protection the program requires. . . . Access to a public forum, for instance, does not depend upon majoritarian consent." *Id.* at 235.[16]

Both *Rosenberger* and *Southworth* applied straightforward First Amendment doctrines without so much as a hint that the voluntary or contractual nature of the students' attendance at the university would call for any diminished protection for their expression. The same can also be said for the Court's prior decisions addressing the First Amendment rights of university students. *E.g., Fox, supra*; *Widmar v. Vincent*, 454 U.S. 263 (1981) (student religious group had equal access right to university facilities); *Papish v. Board of Curators*, 410 U.S. 667 (1973) (expulsion of student for distributing on a college campus a newspaper that included profanity and an offensive cartoon violated First Amendment); *Healy v. James*, 408 U.S. 169 (1972) (student group could not be denied campus recognition because of its political views).[17]

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[16] The issue was remanded for factual clarification. 507 U.S. at 235-36.

[17] The cases recognize that universities may "enforce reasonable rules of conduct," but they cannot enforce the rules in ways that infringe on protected speech. *E.g., Papish*, 410 U.S. at 669-70; *Healy*, 408 U.S. at 180.

The professional licensing decisions offer further support for application of traditional First Amendment principles in this case. Attorneys do not have to join a state bar; there are numerous ways in which they can put their degrees to use without securing a law license. (*E.g.*, law professor, financial advisor, corporate counsel, government attorney.) If they choose to practice law, however, then (in most states) they must join a bar organization and submit themselves to the authority of the state bar. As numerous precedents of this Court have established, that authority to regulate the licensing of lawyers is not a license to ignore members' First Amendment rights. *E.g.*, *Peel v. Attorney Registration and Disciplinary Committee*, 496 U.S. 91 (1990) (discipline of lawyer for providing information about his certification as a civil trial specialist violated First Amendment); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (ban on lawyers' advertising violated their free speech rights); *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971) (bar may not, consistently with the First Amendment, condition admission on answering questions about protected political associations); *Schware v. Board of Law Examiners*, 353 U.S. 332 (1957) (bar could not rely on applicant's past Communist Party membership to conclude he lacked moral character for admission to the bar).

Two cases have particular relevance to the facts in this case. In the first, *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988), the Court overturned as violating the First Amendment a state bar's discipline of a lawyer for mailing a solicitation to persons known to be in need of particular legal services. Correspondence, including a targeted mailing, does not present the same risk of deception and coercion as in-person solicitation does. *Compare Primus*, *supra*, *with Ohralik*, *supra*. Moreover, the Court noted, "the State can regulate . . . abuses and minimize mistakes through far less restrictive and more precise

means, the most obvious of which is to require the lawyer to file any solicitation letter with a state agency, giving the State ample opportunity to supervise mailings and penalize actual abuses." 486 U.S. at 476. Accordingly, the State must permit truthful, nonmisleading attempts by a lawyer to inform potential clients about his or her services. Similarly, the TSSAA cannot punish the conveyance by Brentwood of information to families under contract. Rather, if it has a legitimate interest in regulating such correspondence,[18] it can do so by requiring the school to submit copies of the letters.

A second case held that even in-person solicitation by a professional can be protected speech – if it does not threaten the state's regulatory interests. When CPA Scott Fane moved to Florida and became licensed by the Florida Board of Accountancy, he learned that the Board prohibited him from contacting business persons and arranging to meet with them to explain his services and expertise. This Court concluded that the ban on such contacts did not directly advance the Board's interests in preventing fraud, protecting clients' privacy, and maintaining the appearance and fact of accountants' independence. *Edenfield v. Fane*, *supra*. Because Fane proposed selling himself to sophisticated business persons – who receive individualized sales pitches on a recurrent basis – the risk of coercion and deception identified in *Ohralik* was not present. And because the meetings would occur in a business contact, the ban did nothing for clients' privacy. Finally, the Board had failed to adduce any persuasive evidence that the ban enhanced CPAs' independence. 507 U.S. at

[18] The potential for abuse in the communications between a school and families under contract is *de minimis*. Why TSSAA should insinuate itself into such correspondence is not self-evident.

761-63. At the same time, the opportunity for meaningful give and take discussion between Fane and potential clients heightened the First Amendment interests of both sides. Consequently, the Court invalidated the no solicitation rule as applied to Fane's circumstances. In the absence of an actual threat to the government's interest, the state could not preclude the communication of accurate information. In this case, TSSAA's interests in preventing its regulatees from harassing potential students, from overemphasizing athletics, and from disrupting competition do not apply to the conveyance of accurate information by a school in one letter and one phone call to families already under contract.

That returns the analysis to the point made in Part I, *supra*. An interpretation of the First Amendment that would permit the TSSAA to prohibit or punish the speech in this case, and to direct the speech of its regulatees as if they were grant recipients, would seriously threaten the flow of information in competitive markets. In many of these licensing cases – *Va. State Bd. of Pharmacy*, lawyer advertising, *Edenfield*, the case at bar – the governmental entity is suppressing competition. In such cases, it is consumers like the *amici* who are injured. The First Amendment protects the markets of ideas and information, not just the rights of speakers. *E.g.*, *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 390 (1969); *New York Times v. Sullivan*, 376 U.S. 254, 273-76 (1964); *United States v. Associated Press*, 52 F. Supp. 362, 372, 374-75 (S.D. 1943) (3-judge court) (L. Hand, J.), *aff'd*, 326 U.S. 1 (1945). Fane's potential clients were given the opportunity to decide for themselves if they wanted to hear his spiel. The parents in this case similarly had the right to know about the opportunity to send their children to spring football practice.

B. Brentwood Is Nothing Like an Employee or an Independent Contractor Working for TSSAA.

TSSAA maintains that Brentwood's contract with it renders the school akin to a public employee or an independent contractor that performs services for the State. Hence, the Association says, Brentwood's speech is protected from TSSAA reprisal only if it relates to a matter of public concern.[19] The argument fails for much the same reasons as the government grantee arguments fail. TSSAA has no interest in regulating Brentwood's speech analogous to that described last year by this Court in *Garcetti v. Ceballos*, ___ U.S. ___, ___, 126 S.Ct. 1951, 1958 (2006): "Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services." Employers pay and direct their employees in order to execute the company or agency business. Thus, when an employee speaks in his

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[19] This Court's cases have held that a public employee's speech regarding a matter of public concern is protected from retaliation unless the government can meet compelling state interest analysis. *E.g.*, *Rankin v. McPherson*, 483 U.S. 378 (1987); *Pickering v. Board of Education*, 391 U.S. 563 (1968). That standard does not apply if the speech is not about a public concern. It does not follow, however, that an employee has no First Amendment right to engage in speech that is unrelated to a matter of public concern. The government certainly could not punish one of its employees for speech about a private matter engaged in away from the workplace and unrelated to any legitimate employer concern. *See, e.g.*, *Bartnicki v. Vopper*, 532 U.S. 514, 547, 553-54 (2001) (Rehnquist, C.J., dissenting) (statute promoted 1st Amendment values by preventing self-censorship of and chilling effect on private speech); *Dun & Bradstreet Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760 (1985); *Connick v. Myers*, 461 U.S. 138, 147 (1983) ("We do not suggest . . . that Myers' speech, even if not touching upon a matter of public concern, is totally beyond the protection of the First Amendment"). As demonstrated in Part II, TSSAA had no legitimate interest in disciplining Brentwood's speech in this case.

role as an employee, he or she does so under the employer's supervision. As in *Garcetti,* employee speech in that context is therefore subject to managerial discipline. None of that is relevant to Brentwood, which is not responsible for executing the Association's business. Brentwood performs no service for TSSAA, and TSSAA pays Brentwood nothing. TSSAA's interest in regulating the speech of Brentwood Academy with potential students is completely different from its interest in controlling the speech of the employees who conduct the Association's business.

TSSAA's assertion that Brentwood's contract with it is an "up front" promise to abide by its rules and thus constitutes a waiver also lacks force. Waivers must be knowing and unambiguous. There is no knowing waiver of the right to unobtrusively communicate accurate information in a promise not to engage in "undue influence." To argue that a ban on "undue influence" unambiguously prohibits notifying incoming students about a school activity is to plead for the fantastical.[20] Moreover, even if Brentwood waived some of its own speech rights, it could not waive the rights of *amici* and other parents and of students who had the right to receive information about school activities.

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[20] Petitioner can draw no support from *Snepp v. United States*, 444 U.S. 507 (1980). There, the contract that Snepp signed was unambiguous: everything he wrote had to be submitted to his public employer for approval. Moreover, the concerns of his employer – the C.I.A. – are so different from virtually any other employer, and affect interests of national security and of the highest magnitude, *see* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1503 (1989), that the case cannot possibly be useful guidance in the regulation of speech about high school athletics.

IV. THE RECRUITMENT RULE WAS APPLIED TO BRENTWOOD'S SPEECH BECAUSE OF ITS CONTENT, AND TSSAA CANNOT THEREFORE PUNISH THE SPEECH UNLESS IT CAN SHOW THE SPEECH WAS UNPROTECTED SPEECH OR THAT ITS PUNISHMENT WAS NECESSARY TO ACHIEVING A COMPELLING STATE INTEREST.

Regardless of whether the recruiting rule facially regulates on the basis of content, *see* Part V, it is clear that the rule was applied to Brentwood's speech because of its contents. As the district court noted in this case, "Defendant Ronnie Carter, the Executive Director of the TSSAA, testified that the Spring Practice Letter and follow-up calls were harmful undue influence because of their contents[.]" 304 F. Supp. 2d at 991. The content identified as triggering the recruitment rule included the letter's use of "enrolled" to describe the incoming Brentwood students; Flatt's reference to Brentwood as the students' "new team;" Flatt's qualification that said, "if you are not currently involved in sports" (relevant, TSSAA said, because it emphasized athletics by not mentioning other activities); the phrase, "inconvenience to your parents" (relevant, TSSAA said, because it did not include inconvenience to the students); the phrase "definitely be to your advantage" (relevant, TSSAA said, because that really means the practices were not optional); the coach's phone number; and the phrase "become an Eagle" (relevant, TSSAA said, because the students were not yet attending classes at Brentwood). *Id.* The district court concluded:

> The Court finds that the preponderance of the credible evidence at trial is that the substantive "content" of the Spring Practice Letter and calls mattered and was a significant factor in the

> TSSAA's decision that the letter and calls constituted "undue influence" and violated the Recruitment Rule. The TSSAA penalized Brentwood Academy for the substantive "content" of the Spring Practice Letter and calls and the message they conveyed in this case.

Id., n.4.

Even if the recruitment rule does not specifically refer to speech, if it is applied to speech because of its content, then the First Amendment requires that the speech either be within an excludable category of speech (like defamation, obscenity, etc.) or that the application is necessary to accomplish a compelling state interest. *E.g.*, *United States v. Eichman*, 496 U.S. 310, 315-18 (1990); *Texas v. Johnson*, 491 U.S. 397, 410-16 (1989). Thus, a law that criminalizes disturbing the peace would not on its face raise First Amendment concerns, but its application to the speech expressed in *Cohen v. California*, 403 U.S. 15 (1971), resulted in a finding of unconstitutionality. *Accord*, *Terminiello v. City of Chicago*, 337 U.S. 1 (1949). The same principle has been applied to common law standards regulating conduct but applied to expressive activities because of their content. *E.g.*, *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (intentional infliction of emotional distress tort applied to magazine parody); *Gelalla v. Onassis*, 487 F.2d 986 (2nd Cir. 1973) (intrusion privacy tort applied to conduct of photojournalist); *see also NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). Clearly, Brentwood's expression in this instance was not within one of the categories of speech that may be prohibited by the State. Thus, for TSSAA to sustain its disciplining of Brentwood's speech, it must make the showing that its action was necessary to achieve a compelling state interest. *Eichman*, *supra*; *Texas v. Johnson*, *supra*. For the reasons stated in Part II, the TSSAA's application of its

recruiting rule to Brentwood's speech cannot satisfy that demanding standard.

V. TSSAA'S RECRUITING RULE, AS INTERPRETED BY THE TSSAA, IS UNCONSTITUTIONAL ON ITS FACE.

Amici urge this Court to declare the petitioner's recruiting rule to be facially invalid. The brief of *amicus curiae* Association of Christian Schools International has amply explained the rule's facial invalidity, and that explanation need not be repeated here. Part I, *supra*, also describes ways in which the rule spreads a net that encompasses much speech of value to families making school choices. *Amici* briefly supplement those arguments here.

The restrictions on initiating contact, especially when combined with restrictions on personal interaction, are particularly problematic because they prevent schools from reaching low-SES families in an effective manner. As previously explained, those families are not likely to take the initiative in searching out educational alternatives. They will not then obtain the information they need about their choices unless schools are permitted to seek them out. And schools cannot do that effectively without personal contact. As a consequence, the low-SES students miss opportunities otherwise available, and schools like Brentwood lose the diversity they could otherwise obtain.

TSSAA's restrictions on initiating contact cut against some very basic First Amendment values. Those values were recognized and vindicated in *Madsen v. Women's Health Center*, 512 U.S. 753 (1994), which overturned an injunction provision that prohibited abortion protestors from approaching within 300 feet of a health clinic any person seeking services of the clinic "unless such person

indicates a desire to communicate." According to the Court:

> [I]t is difficult, indeed, to justify a prohibition on all uninvited approaches of persons seeking the services of the clinic, regardless of how peaceful the contact may be, without burdening more speech than necessary to prevent intimidation and to ensure access to the clinic. Absent evidence that the protesters' speech is independently proscribable (i.e., "fighting words" or threats), or is so infused with violence as to be indistinguishable from a threat of physical harm, see Milk Wagon Drivers, [this] provision cannot stand. . . . The "consent" requirement alone invalidates this provision; it burdens more speech than is necessary to prevent intimidation and to ensure access to the clinic.

Id. at 774.

Recruitment of high school students can certainly be regulated. The TSSAA can use a wide variety of devices to vindicate its concededly legitimate interests. It can limit the number of contacts a school makes and impose substantial time, place, and manner restrictions on coaches. The net the TSSAA has cast through its interpretation of what is undue influence, however, disables schools from effectively recruiting a wide and diverse range of students. Appropriate school officials need the freedom to identify prospective students who qualify for admission, to initiate contact with parents, and to conduct in-person discussions to address the many issues involved in school choice. For *amici*, TSSAA's use of its recruitment rule is especially problematic because it prevents many parents from obtaining the information they need, and to which they are entitled, to make important decisions about their children's education.

CONCLUSION

This Court should affirm the decision of the Court of Appeals.

Respectfully submitted,

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March 27, 2007

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No. 06-427

IN THE

Supreme Court of the United States

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION,
Petitioner,

v.

BRENTWOOD ACADEMY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* BRIDGES ACADEMY, NASHVILLE, TENNESSEE

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BRIEF OF *AMICUS CURIAE* BRIDGES ACADEMY, NASHVILLE, TENNESSEE

STATEMENT OF INTEREST [1]

Bridges Academy ("Bridges") is a start-up independent secondary school in Nashville, Tennessee.[2] Bridges will accept its first class of students this summer, ahead of the 2007-2008 school year. Bridges is opening with the goal of

[1] The parties have consented to the filing of this *amicus* brief. Letters of consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, *amicus* states that none of the parties nor their counsel wrote this brief in whole or in part and that no one other than *amicus* made any monetary contribution to the preparation or submission of this brief.

[2] The school's website can be found at http://www.bridgesacademy nashville.org

serving as a Christian, college-preparatory, middle school and high school designed to mold inner-city boys into community leaders. The school offers a full range of core academic subjects, as well as specialty topics such as entrepreneurship, technology, community leadership, music, and programs in the arts.

Athletics and sportsmanship are central to the school's mission of molding boys into community leaders. As such, Bridges plans to be a member of the Tennessee Secondary School Athletic Association ("TSSAA") for the 2008-2009 school year, when the school fields its first class of seventh grade students.

Bridges has a strong interest in seeing that its First Amendment rights to openly and honestly recruit both athletes and student non-athletes are preserved. With athletics and sportsmanship being so central to its mission, Bridges must be a member of TSSAA to be successful. Yet TSSAA's Recruiting Rule directly and substantially chills the ability of Bridges to employ its person-to-person, face-to-face model of recruiting at-risk inner-city youth because the Recruiting Rule places unconstitutional restrictions on the school's right to communicate with prospective students.

INTRODUCTION AND SUMMARY

Bridges is a start-up private school for boys in inner-city Nashville, Tennessee. Its target student population will be comprised of boys who are struggling in failing inner-city public schools, and who can benefit from a highly-structured, college preparatory environment that offers one-to-one contact between students and educators. This contact begins with the recruiting process, during which staff members and community volunteers representing the school visit the homes of potential students to conduct in-person interviews and informational sessions with the boys and their families.

TSSAA's Recruiting Rule directly chills constitutionally protected speech in which Bridges might otherwise engage, and threatens the efficacy of its entire recruiting model. That recruiting model is central to getting at-risk boys to enroll in Bridges. Other methods of distributing information—such as waiting for students and their parents to stumble upon the school's website—are ineffective at reaching the population that Bridges needs to reach. It is probable that athletics will be discussed during the home visits and afterward—such a conversation would naturally occur as the staff member or volunteer attempts to tell the school's story and convince the boys' parents to enroll them at Bridges.

The Recruiting Rule is either unconstitutionally vague (under TSSAA's interpretation) or unconstitutionally overbroad. Facially, the rule appears to prohibit nearly all contact between a private school and a potential student. This seems absurd, as private schools must be allowed to send applications, medical forms, reading lists, and the like to prospective students if they are to achieve their enrollment targets. If the Recruiting Rule does not intend to regulate these types of activity, then it chills protected speech through its vagueness. If the Recruiting Rule does in fact intend to prohibit all forms of contact between a private school and a prospective student, then it is vastly overbroad, and restricts whole swaths of constitutionally protected speech. It can only be one or the other. There is no saving interpretation.

Neither Bridges nor Respondent Brentwood Academy would object to a reasonable, narrowly-tailored recruiting rule that specifically targeted the acknowledged evil of recruiting misconduct. However, the Recruiting Rule is not such a rule. TSSAA's unwillingness to consider rewriting the Recruiting Rule exposes TSSAA's real motive in this case: to selectively use a vague Recruiting Rule to punish schools that are threatening the athletic dominance of the public school majority of its membership. What is needed, instead, is a set

of rules that are narrowly tailored to the evil they supposedly target.

ARGUMENT

I. BRIDGES ACADEMY HAS A UNIQUE STORY THAT IT SHOULD BE ALLOWED TO TELL PROSPECTIVE STUDENTS

The free exchange of information is a crucial component of the private school recruiting process. Unlike public schools, which may be the default choice for many students, private schools must be able to freely provide accurate and complete information to potential students and their families. This is especially true in the case of inner-city students, who may feel trapped by a failing public school system, but who may be unaware of private school alternatives. The private school must be able to tell its story to these families.

Bridges was founded with the express mission of reaching out to at-risk, inner-city boys, bringing them into a structured and nurturing educational environment, and molding them into leaders of their communities. The Bridges recruiting model therefore differs substantially even from those of other private schools. Public schools can, of course, rely on the fact that they are the default choice for most students. They do not need to do any outreach—students are routed to them automatically by the state. Even many established private schools have a sort of automatic recruiting system, where reputation, word of mouth, church affiliation, and rankings in independent reports ensure that students and parents are generally aware of the alternatives those schools offer.

Bridges, on the other hand, relies specifically on community outreach to find students and bring them through its doors. The internal organization of the school reflects this. Bridges is served by a Board of Directors and a Board of Advisors, each of which is composed of community leader volunteers. Many of the members of these boards were

themselves disadvantaged youth in inner-city Nashville. They see the school as a way to reach out to children who stand today where they stood twenty or thirty years ago. Thus, these board members play an active role in reaching out to the community and encouraging it to send its boys to Bridges. In addition to these board members, Bridges employs both paid staff and volunteers to go into the community around the school to identify and recruit boys who will benefit from the unique environment that Bridges offers. This usually involves in-home, one-on-one meetings with the student and his family. The entire model is built upon this personal, face-to-face approach.

Even the school day at Bridges is different from other schools. Somewhat unusually for a private school, Bridges provides bus transportation for students whose parents lack the ability to transport their children to school in the morning. The school day begins promptly at 8:00 A.M., and includes a complete college preparatory curriculum. For students whose caregivers cannot pick them up when the formal school day ends at 3:00 P.M., Bridges offers an after school program that runs until 6:30 P.M. The program is designed to keep students immersed in a positive, structured academic environment and away from negative influences. By beginning the day with private busing and ending it with a lengthy after-school program, including athletics, students spend more of each day in an environment that is geared toward ensuring their safety and success. Parents and caregivers who work during the day can be assured that their children are safe in school rather than on the streets or home alone.

The Recruiting Rule prevents Bridges from mailing the above summary to a prospective student because, under a strict reading of the Recruiting Rule, such a summary could constitute undue influence. Bridges has an important story to share with inner-city parents and their children. Its structure, focus, and methodology are unique, especially when Bridges

is compared to public schools that offer a standard school day, little one-on-one contact between students and educators, and minimal supervision of children once they are cut loose at 3:30 P.M. Obviously, the unique Bridges story will influence many parents to enroll their children there and influence the boys themselves to want to go.

People speak in order to influence others, and they are given freedom of speech so that they may influence others freely. TSSAA claims a justifiable concern about recruiting misconduct—a concern with which neither Bridges nor Respondent Brentwood Academy disagree. But under the guise of claiming to regulate undue influence, TSSAA has crafted a Recruiting Rule that prohibits nearly any influencing, due or undue, of potential students on the part of private schools. If the Recruiting Rule does not intend to regulate constitutionally protected speech, then it is vague; otherwise, it is overbroad. In either case, it should be re-written to narrowly capture the stated interest of TSSAA in curbing undue influence.

II. THE RECRUITING RULE IS AN UNCONSTITUTIONAL TIME, PLACE, AND MANNER RESTRICTION ON THE FREEDOM OF SPEECH THAT PRIVATE SCHOOLS ENJOY UNDER THE FIRST AMENDMENT

The Recruiting Rule is comprised of the simple rule plus a body of interpretive commentary. The simple Recruiting Rule seems straightforward: "The use of undue influence on a student (with or without an athletic record), the parents or guardians of a student by any person connected, or not connected, with the school to secure or to retain a student for athletic purposes shall be a violation of the recruiting rule." J.A. 181. But the *Guidelines For Understanding The "Recruiting Rule" and Understanding "What Is Undue Influence?"* prove just how vague the Recruiting Rule actually is.

J.A. 181-187. The guidelines reveal that TSSAA has an expansive definition of undue influence, including "Any contact between a member of the coaching staff or representative of the school and prospective student/athletes prior to, during, or after contests at elementary schools, middle schools, and junior high schools except where there is a definite feeder pattern." J.A. 183.

Thus, no contact may occur before or after athletic events, but how far before or after? A day? A week? A month? The Recruiting Rule and its interpretive guidelines are silent on this question. The interpretive guidelines also provide that "[p]rivate or parochial schools may not contact students enrolled at the public schools." J.A. 183. Does this mean initial contact? Does it prohibit mass mailings? Does every meeting have to be initiated by the student if he is currently enrolled at a public school? The interpretive guidelines seem to imply that the prohibited contact is somehow related to athletics or athletic events, which might narrow the Recruiting Rule somewhat. But a plain reading of the interpretive commentary can only the school representative fearful that any contact at any time can, technically, violate the rule. This fear is further stoked by TSSAA's seemingly uneven enforcement actions.

Assuming the Recruiting Rule constitutes a restriction on the time, place, and manner of communication that may occur between private schools and students they are recruiting, its plain terms basically prohibit "any contact" between the school and the student prior to matriculation. *See United States v. O'Brien*, 391 U.S. 367, 382 (1968).[3] In the case of a

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[3] Bridges accepts for purposes of argument the Sixth Circuit's conclusion that the Recruiting Rule represents a time, place, and manner restriction on free speech. Other *amici*, specifically Christian Schools International, make a persuasive argument that the Recruiting Rule is a content-based restriction. We choose to address the Recruiting Rule here

time, place, and manner restriction on free speech, the Court should examine whether the restrictions are "justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). The Recruiting Rule leaves open no alternative channels of communication between the school and potential students. It closes them all off and leaves it up to the TSSAA to selectively determine when some invisible line has been crossed by a school in any particular instance. This results in a vague rule with which member private schools are uncertain how to comply. And if the Recruiting Rule is not vague—if it really does prohibit all contact between the schools and potential students—then it is overbroad. In either case it is unconstitutional. *Village of Hoffman Estates*, 455 U.S. 489, 494-495 (1982).

A. The Recruiting Rule is vague

No teacher, coach, or administrator could reasonably conclude that the "undue influence" targeted by the Recruiting Rule would literally include "any contact" between the school and the student. The Recruiting Rule is therefore facially vague and vague when read together with TSSAA's interpretive commentary. This is the same type of vagueness that was at issue in *City of Houston v. Hill*, 482 U.S. 451, 451-452 (1987), where a municipal ordinance prohibited "any manner" of speech that would interrupt a police officer in the course of his or her duty. This Court held that the ordinance was invalid because it gave the state "unconstitutional discretion in its enforcement." *Id.* at 466. The vagueness of the Recruiting Rule provides TSSAA a similar degree of unconstitutional discretion. In *Houston*, this Court noted that

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as a time, place, and manner restriction because we believe it cannot withstand constitutional scrutiny even under that more relaxed standard.

the ordinance was "admittedly violated scores of times daily, yet only some individuals—those chosen by the police in their unguided discretion—[were] arrested." *Id.* at 466-467. Private schools constantly send families application forms, medical release forms, curricula, notices, and reading lists. If TSSAA prosecuted every literal violation of the Recruiting Rule, the entire system of enforcement would crumble. Instead, TSSAA hides behind the vagueness of the rule to engage—as did the City of Houston—in discretionary prosecution.

It is precisely this fear of prosecution that chills the efforts of schools like Bridges to engage in constitutionally protected speech when they recruit and communicate with incoming students. Suppose the school has gotten word, through its connections in the community, that a particular boy would be a good candidate for the Bridges curriculum. Normally, the school would initiate contact through a staff member, board member, or community volunteer. This would usually include a home visit to discuss the opportunities that Bridges affords its students, the logistics of enrolling the student, and a question and answer period for the family. After the home visit, the school might follow-up by mailing an information packet to the family. If the student chose to enroll, the school would need to exchange a substantial amount of information with the family prior to matriculation. This would include applications, financial aid information, medical release forms, parental consent forms, details of the curriculum, and suggested summer reading lists.

Under the Recruiting Rule, all of the activities discussed above are suspect. Yet each activity listed above involves normal, legal, constitutionally protected speech. How is Bridges to know whether it is violating the Recruiting Rule or not? The simple rule prohibits "undue influence," but the interpretive guidelines seem to prohibit much more. J.A. 181-187. They state that "any contact" between the school

and the potential student is "a violation" of the Recruiting Rule. *Id.* Does this mean that the school cannot send any information at all to the student? In that case, the Recruiting Rule would be clear but overbroad, as discussed below. If all contact is not prohibited, then what type of contact is? The Recruiting Rule does not say, which means that, as in *Keyishian v. Board of Regents*, 385 U.S. 589, 599 (1967), no one "can know just where the line is drawn." It is up to TSSAA to determine whether a school has committed a violation.

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications.

Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972). That is exactly what the Recruiting Rule does. It delegates the basic question of whether undue influence has occurred to a decision making body (TSSAA) without giving member schools fair warning of specifically prohibited conduct. The schools do not know what conduct is prohibited and are therefore unable to ensure their compliance with the Recruiting Rule.

B. If the Recruiting Rule is not vague, then it is overbroad

If the Recruiting Rule is not vague, then it is overbroad. It seems inconceivable that the Recruiting Rule literally pro-

hibits "any contact" between the school and the prospective student. Such a rule would completely stifle the recruiting efforts of Tennessee's private schools (tellingly, the rule excludes schools with a definite "feeder pattern," meaning nearly all public schools). If that is not what the Recruiting Rule intends to accomplish, then it is vague. Otherwise, it is overbroad. There is no saving interpretation.

The normal exchange of information between schools, students, and families involves speech that is clearly lawful and constitutionally protected. As we discuss further below, we do not argue with the state's claim that it has a compelling interest in protecting athletes from exploitation. But those rules must not—as they do here—be so overbroad that they also prohibit constitutionally protected speech. The Recruiting Rule even prohibits contact with students who have expressed no desire to participate in athletics at all. Such students are still, according to TSSAA, potential athletes, and are therefore subject to the same rules as actual athletes. J.A. 182. Thus, the Rule stands between the private school and its entire potential student body.

The Recruiting Rule fails the test articulated by this Court in *Ward*. "Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward*, 491 U.S. at 799. Unlike the regulation at issue in *Ward*, the Recruiting Rule does not sweep in some small portion of protected speech. This is not a case where the TSSAA has drafted thoughtful, deliberate rules to address undue influence which also happen to prohibit some constitutionally protected speech. Rather, TSSAA has crafted a rule that is so broad that, according to TSSAA's own interpretive guidelines, it prohibits *all* contact between the school and potential students. J.A. 181-187.

"A complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988).

A literal reading of the Recruiting Rule means that TSSAA has enacted the equivalent of a complete ban on contact between potential students and private schools (those without an established feeder system). For this ban to be constitutional, the distribution of applications, information packets, financial aid information, and summer reading lists must each be "an appropriately targeted evil." The Recruiting Rule fails to meet that standard because the state has no independent interest in regulating such activities.

The Recruiting Rule leaves private schools adrift in open water and hoping that the TSSAA will not single them out for punishment. In reality, the schools must communicate with students and their families. Silence is not an option. This is especially true for a start-up school like Bridges and it is especially true for schools, like Bridges, that are conducting outreach to an inner-city population that may not be as sophisticated in its approach to education alternatives as other education consumers. So although these schools must continue to communicate, they do so in a climate of uncertainty and dread—uncertainty regarding whether TSSAA will deem any of their activities to be violations of the Recruiting Rule, and dread that an infraction, once "identified," will negatively impact the athletic programs that are such an integral part of their curricula.

III. NEITHER BRIDGES NOR BRENTWOOD OBJECT TO REASONABLE, CLEAR PROHIBITIONS ON RECRUITING MISCONDUCT

We recognize that schools and coaches do sometimes inappropriately recruit student athletes. To the extent that students are pressured or deceived into making decisions that are against their best interests, all schools—public and private—share a responsibility to help mitigate the problem. Bridges does not object to a reasonable Recruiting Rule that specifically targets recruiting misconduct. To the extent that

schools and coaches are bribing, pressuring, or lying to potential athletes in order to recruit them, that behavior should be curbed and there is a legitimate state interest in doing so.

Perhaps even more than most states, high school athletic events in Tennessee are highly competitive. Bridges would not object to TSSAA promulgating a set of clear, specific, narrowly-tailored guidelines to prevent student athletes from being exploited by schools and coaches. However, such a set of rules would apparently not satisfy TSSAA. Rather than a set of clear, reasonable rules, TSSAA favors the existing Recruiting Rule. The status quo allows TSSAA to selectively target schools it wants to punish, then use the Recruiting Rule to weaken those schools' athletic programs to the benefit of the public schools whose members control TSSAA's governance. Robert Morris Rogers, a board member of TSSAA, has admitted that the Recruiting Rule is "really for protection of schools and coaches" and that its focus is "keeping them from losing their best players." J.A. 368-69. We should not be surprised that TSSAA is unwilling to consider a new set of rules because, by doing so, they would lose the Recruiting Rule as a pretextual basis for discriminating against private schools.

IV. BRIDGES HAS NO ALTERNATIVE BUT TO BELONG TO TSSAA, A STATE ACTOR

This Court decided the state action question in *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001), although TSSAA has asked the Court to reexamine it. Pet. Br. At 46-50. Both Brentwood and other *amici* have briefed the state action question in depth; therefore, Bridges will not revisit those same arguments here. Bridges would note, however, that Brentwood and other *amici* are correct when they argue that Tennessee secondary

schools that wish to participate in athletic competition have no realistic option except to join TSSAA.

Especially as a start-up school, Bridges has no existing competitors. Virtually all high school athletics in Tennessee are regulated by TSSAA, and the natural competitors of Bridges are other members of TSSAA. Bridges has no realistic alternative but to join TSSAA if it wants to offer athletics as part of its curriculum, and such activities are especially important to Bridges and the type of students it has as its mission to recruit. The students and families to whom Bridges reaches out view athletics as an important part of the school experience. The boys who will be playing on the school's teams will learn important life lessons about sportsmanship and teamwork on the playing field that they cannot learn elsewhere in the curriculum. To be successful in its mission, Bridges must offer athletics. And to offer a legitimate athletics program, Bridges has no alternative but to join TSSAA.

CONCLUSION

Respectfully, for the reasons stated above as well as those in Respondent's brief, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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March 27, 2007

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No. 06-427

In The
Supreme Court of the United States

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION,
Petitioner,
v.
BRENTWOOD ACADEMY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICUS CURIAE* OF CENTER FOR EDUCATION REFORM and EXCELLENT EDUCATION FOR EVERYONE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

This brief will address the second question presented:

Whether the Sixth Circuit correctly held that TSSAA violated the First Amendment and Due Process rights of Brentwood Academy when its rules impose limitations on the content of communications between Brentwood Academy and students who had entered into contracts to attend Brentwood and their parents, and imposed penalties, including a monetary fine, for violations of those rules.

RULE 29.6 STATEMENT

Amici are not-for-profit corporations.

None of the *amici* have parent or subsidiary corporations and are not issuers of any class of stock, and no publicly held corporation owns 10% or more of the stock of any of any of the *amici*.

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No. 06-427

In The
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TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION,
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICUS CURIAE* OF CENTER FOR EDUCATION REFORM and EXCELLENT EDUCATION FOR EVERYONE, IN SUPPORT OF RESPONDENT

INTEREST OF *AMICI CURIAE* [1, 2]

The **Center for Education Reform** ("CER") is a national, independent, non-profit advocacy organization that creates opportunities for and challenges obstacles to better education for America's communities. CER advances substantive reforms that produce high standards, accountability and freedom of choice. CER is a full-service education reform engine that works with diverse constituencies to restore excellence and equity to America's public schools.

Excellent Education for Everyone ("E3") is a coalition of New Jersey citizens from across the political spectrum, of all races, all religions, and all ethnic groups, and all regions of the State of New Jersey. E3's goal is to ensure that all parents, regardless of income, have the power and resources to determine where and in what way their children will be educated. E3 supports programs designed to improve public schools by subjecting them to the competitive pressures of parental school choice.

STATEMENT OF THE CASE

The TSSAA is an association of 290 public schools and 55 independent and parochial schools from across the state of Tennessee. The TSSAA is organized for the purpose of stimulating and regulating interscholastic athletic competition among its member schools. The Tennessee State Board of

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[1] Petitioner, by letter dated October 20, 2006, and Respondent, by letter dated March 21, 2007, have consented to the filing of *amicus* briefs in support of Respondent.

[2] In accordance with Rule 37.6, *amici* state that no counsel for either party has authored this brief in whole or in part, and no person or entity other than *amici* has made a monetary contribution to the preparation or submission of this brief.

Education has explicitly acknowledged the TSSAA's functions "in providing standards, rules and regulations for interscholastic competition in the public schools of Tennessee" for over 80 years. *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288, 292 (2001). In 1972, the Board designated the TSSAA as "the organization to supervise and regulate" interscholastic athletics and specifically approved the TSSAA's rules and regulations. *Id.*

The TSSAA has promulgated a "Recruiting Rule," found in section 21 of the TSSAA's Bylaws[3]:

> The use of undue influence on a student (with or without an athletic record), his or her parents or guardians of a student by any person connected, or not connected, with the school to secure or to retain a student for athletic purposes shall be a violation of the recruiting rule.

Brentwood Academy v. Tennessee Secondary School Athletic Association, 304 F. Supp. 2d 981, 984 (M.D. Tenn 2003).

The bylaws also include a number of questions and answers and other guidelines that are known as "interpretive commentary." The interpretive commentary includes the following:

1.

> Q. How is undue influence interpreted in the recruiting rule?
>
> A. A person or persons exceeding what is appropriate or normal and offering an incentive or inducement to a student with or without an athletic record.

***

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[3] Sometimes referred to hereafter as the "Recruiting Rule" or the "Rule."

3.

Q. Is it permissible for a coach to contact a student or his or her parents prior to his enrollment in the school?

A. No, a coach may not contact a student or his or her parents prior to his enrollment in the school. This shall apply to all students whether or not they have an athletic record.

4.

Q. What are some of the guides [sic] used in determining whether there has been undue influence used which would result in a violation of the recruiting rule?

A. Some examples are, but not limited to:

***

3. Any initial contact[4] or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/athlete enrolled in any member school except where there is a definite feeder pattern.

4. Any initial contact or prearranged contact by a member of the coaching staff or representative of the

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[4] Although" examples" 3 and 4 use the phrase "initial contact," paragraph 1 of the "Guidelines for Understanding The 'Recruiting Rule' and Understanding 'What Is Undue Influence?'" states:

> 1. The major theme of the "recruiting rule" is not "initial contact." The major theme is "exceeding what is normal and appropriate." Initial contact can be a violation, but is only one of many things that can exceed what is normal and appropriate.

> school and a prospective student/athlete in the seventh grade and above at any non-member school except where there is a definite feeder pattern involving the schools.
>
> . . .
>
> Private or parochial schools may not contact students enrolled at the public schools. Public schools may not contact students enrolled at the private schools.
>
> ***
>
> 7. Admitting students to athletic contests free of charge when there is an admission being charged at the contest except where there is a definite feeder pattern involved with the school.

See 304 F. Supp. 2d 981, 985 (M.D. Tenn. 2003) and *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 442 F.3d 410, 416-417 (6th Cir. 2006).

Brentwood Academy is an independent school in Brentwood, Tennessee, and a member of the TSSAA. In 1998, the school had about 520 students in grades six through twelve. "The 'definite feeder pattern' exception does not apply to Brentwood, except with regard to those students who are enrolled at Brentwood Academy itself in the sixth grade or higher." 442 F.3d 410, 416-417.

Brentwood Academy was penalized severely by TSSAA, previously found by this Court to be a governmental actor, for violating a rule regulating communication about a legitimate school activity offered by Brentwood because Brentwood's communication allegedly involved "undue influence," that is "exceeding what is appropriate or normal." 304 F. Supp. 2d 981, 984; 442 F.3d 410, 416-417. The phrase "appropriate and normal" and its component words are not defined in the Recruiting Rule or in the questions and answers and other

guidelines that are known as "interpretive commentary."[5] *See* 442 F.3d 410, 416.

In April 1997 Brentwood's football coach sent a letter to all entering eighth grade boys, without regard to their prior athletic activity or interest (304 F. Supp.2d at 989), inviting them to the team's spring practice. The coach subsequently made phone calls to the families of the boys to whom the letter was sent to clarify that the spring practice was not mandatory and should not take precedence over any other academic or athletic responsibilities the boys might have at their middle school. 442 F.3d 410, 417-418. The students and families receiving the letter and clarifying telephone call from the coach had previously visited the school, the students had applied for admission to Brentwood, had been tested, had been accepted for enrollment, and had committed to attend Brentwood in the fall. *Id.* at 418.

The letter from the football coach informed incoming students of optional spring football practice, a permissible activity. Incoming Brentwood students received a variety of information about "a multitude of topics" including academics and the letters and calls should be seen in this light." 442 F.3d 410, 429.

As the trial court found, the letter and phone calls were informational speech about a permitted athletic practice from a private school to all the parents of all the male students who had applied, taken admissions tests, had been admitted to the school, and had signed contracts with Brentwood. The studentsand their parents had already decided that Brentwood

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[5] The questions and answers and other guidelines that comprise the "interpretive commentary" are referred to hereafter as the "Guidelines." The "interpretive commentary" is meant to aid in the interpretation of the recruiting rule, they are not binding on the TSSAA Board of Control. 442 F.3d 410, 416.

was their school of choice. 304 F. Supp.2d 981, 995, 442 F.3d 410, 428-29.

SUMMARY OF ARGUMENT

School choice is vital, and has been recognized by the federal government and most state governments as an essential way to improve elementary and secondary school education. Parents and students are entitled to a free flow of information regarding all aspects of schools' programs so they can make informed choices and determine the right school and the program for their children.

The TSSAA Recruiting Rule interferes with the flow of essential accurate information from schools to parents and students.

The Recruiting Rule is not content-neutral, goes far beyond regulation of the "time, place and manner" of the school's speech. While TSSAA, as a surrogate for the state, has a substantial interest in ensuring that athletics is subordinate to academic pursuits and to protect student athletes from "exploitation," its Recruiting Rule is narrowly tailored to achieve those purposes.

ARGUMENT

This case is not just about pushups, pass patterns and high school football. The rule of law established here will spill over into other aspects of communication between schools and parents and students about school offerings -- not just athletics -- band, debate, drama and other activities that make up the total educational experience. This is also about competition for students between traditional public and alternative providers of education services, and the ability of schools that offer such education alternatives to compete on a level playing field with

other schools and effectively to offer real choice to students and parents.

More broadly, this case will have significant bearing on the accountability of public school officials who seek to avoid public scrutiny of their performance in educating the nation's children and to limit parents' ability to compare the performance of traditional public schools with the performance of alternative educational institutions.

Recognizing the impending national crisis posed by failing public schools, substantial and far-reaching reforms have been initiated by states and by the federal government in recent years. That many public secondary schools have not been adequately educating the nation's young people has been widely acknowledged. *See, e.g.*, U.S. Dept. of Education, "A Nation At Risk" (1983), a seminal study calling for dramatic education reform because of our failing schools, available at http://www.ed.gov/pubs/NatAtRisk/index.html.

It is now accepted by many, including more than 40 state governments that have enacted charter school legislation, that competition among district-based public schools, charter schools, magnet schools, independent schools and other educational alternatives benefits students at each type of teaching institution. The federal government has also recognized that competition among primary schools and secondary schools enhances the quality of education. In addition to zoned public schools and independent schools[6] current school choices include magnet schools (some of which are curriculum oriented, emphasizing, *e.g.*, mathematics, science, arts, or literature) ; liberal transfer policies among public schools based on curricula; open enrollment; charter

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[6] The term "independent school" usually includes religious schools, single gender schools, and private day schools and boarding schools.

schools; and transfer from low performing public schools pursuant to federal law.[7]

Secretary of Education Rod Paige emphasized that choice fosters competition and encourages improvement:

> Choice fosters competition. It injects market forces into an education system that has been a virtual monopoly and stagnant.
>
> ***
>
> . . . [T]here needs to be multiple delivery systems for education -- healthy market competition. Those options include private schools, home schools, cyber schools, parochial schools. And those options should be available to all parents.

U.S. Secretary of Education Rod Paige, Address to Cato Institute, http://www.ed.gov/news/speeches/2004/05/05112004.html.

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[7] Title V, Part B, Subpart 1 of the No Child Left Behind Act,, P.L. 107-110, 115 Stat 1425 (2002), 20 U.S.C.A. § 6301, *et seq.* specifically encourages the . . . establishment of public charter schools. "The theory behind charter schools is that these alternative programs will provide educational options to students that are not available within the traditional public school system. At the same time, as public schools compete to enroll students, all schools feel pressure to improve the quality of the educational services they provide. In fact, school choice is a key provision of the Title I accountability provisions in No Child Left Behind. This gives parents and students the right to transfer from a school in corrective action to a public school (including a charter school) that provides a higher-quality education." U.S. Department of Education, *No Child Left Behind: A Desktop Reference* 109 (2002). Title V, Part C of the No Child Left Behind Act provides federal assistance to localities to establish "magnet schools", which "[f]or nearly four decades . . . have been an important element in American public education, offering innovative programs not generally available in local schools and providing opportunities for students to learn in racially diverse environments." *Id.* at 113; No Child Left Behind Act of 2001, P.L. 107-110, sec. 501, et seq., 115 Stat 1425 (2002), 20 U.S.C.A. § 6301, *et seq.*

> The basic tenets of charter schools -- give them room to be innovative, hold them accountable for results, and let parents decide if they meet the needs of their children – are perfectly aligned with the historic No Child Left Behind Act (NCLB), which also focuses on accountability for results in return for more flexibility, and with providing more options for parents than ever before.

U. S. Department of Education, "Innovations in Education: Successful Charter Schools" at 1 (2004) at http://www.ed.gov/admins/comm/choice/charter/report.pdf.

Charters are public schools designed to function free of many bureaucratic regulations to permit innovative education methods (for example, small classes, longer school hours, extended school years, school attire, increased parental involvement) in exchange for increased accountability, in accord with federal policy. *See* No Child Left Behind Act of 2001, *supra*. Charter schools legislation has been adopted in 41 states and the District of Columbia. The number of charter schools has increased twenty-fold in the last 20 years. Approximately 4,000 charter schools currently serve over one million students and their families; this compares with approximately 200 charter schools in existence a decade ago. *See* National Charter School Online Directory, available at http://www.edreform.com/charter_directory/data1.cfm and http://www.edreform.com/charter_directory/data2.cfm.

Extracurricular activities, including athletics, constitute an integral component of an overall education. Such activities provide the basis for leadership skills and physical well-being and they are an important element in motivating young people. *See Brentwood Academy v. Tennessee. Secondary School Athletic Ass'n*, 531 U.S. 288, 299-300 (2001); *see also* S. Black, "The Well-Rounded Student: Extracurricular Activities and Academic Performance Go Hand in Hand," 189 *American School Board Journal* (2002); N. Darling, "Participation in

Extracurricular Activities and Adolescent Adjustment: Cross-Sectional and Longitudinal Findings," 34 *Journal of Youth and Adolescence* 493-505 (2005); M. Zwart, "An Assessment of the Perceived Benefits of Extracurricular Activity on Academic Achievement at Paramount High School," Academic Leadership Live, The Online Journal (2007), available at http://www.academicleadership.org. Many athletes who stay in school or progress to a university setting may be encouraged to study because of their interest in sports. Athletics can provide the exposure to ideas and the motivation to learn. Sports, art, drama, journalism, debating and most other school sponsored extracurricular activities can serve to motivate students and teach them about potential vocations or avocations that will stay with them for life. *See* Black, *supra*. Extracurricular activities in general, and sports in particular, can provide opportunities for children from disadvantaged backgrounds. P. Geary, "'Defying the Odds?': Academic Success Among At-Risk Minority Teenagers in an Urban High School," paper presented at the Annual Meeting of the American Educational Research Association (1988), available at U. S. Department of Education, Institute of Education Sciences, Education Resources Information Center, http://www.eric.ed.gov, ED296055.

I.

THE RECRUITING RULE VIOLATES BRENTWOOD ACADEMY'S FIRST AMENDMENT RIGHT TO FREE SPEECH

A. The Free Flow of Information to Parents and Students Is Essential

Because the widespread availability of educational alternatives is a relatively recent phenomenon[8], parents need to be informed as to the availability of charter and other alternative schools and, of course, how those schools can better serve their children. Public charter schools as well as "magnet" schools must compete for students with other public schools already established in the local geographic school district (to which a student would be assigned automatically), as do independent private schools, church-sponsored schools and home schooling.

Former Secretary of Education Rod Paige has emphasized that choice fosters competition and encourages improvement:

> The [No Child Left Behind] law says parents and taxpayers have a right to information about their local schools and how they compare to other schools. Empowered with this information, parents can vote with their feet and make choices.

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[8] To be sure, private primary and secondary schools have existed since colonial times, and indeed pre-date public schools and parochial or religious schools have also been a factor in primary and secondary education as long. However, these were usually available to the affluent (in the case of private schools) or those belonging to a particular religious denomination (in the case of parochial schools). Charter schools, magnet schools, schools that emphasize a particular set of academic interests, and school vouchers that can be used at private schools are relatively recent innovations to provide school choice to all.

U.S. Secretary of Education Rod Paige, Address to Cato Institute, http://www.ed.gov/news/speeches/2004/05/05112004.html.

The flow of information from schools to parents, as decision-makers, is vitally important to making informed school choices about which school their child should attend and the options available at the school that is ultimately selected.

> For choice to be effective, parents need information about the schools that are available to them, the characteristics of those schools, how the enrollment process works, and the transportation available. Ultimately, parents will want to think about which school would be best for their child, given a range of educational and personal considerations.

U.S. Department of Education, Office of Innovation and Improvement, Innovations in Education: Creating Strong District School Choice Programs (2004), http://www.ed.gov/admins/comm/choice/choiceprograms/report. pdf.

A school's communication with parents and students concerning the school's programs thus touches a vital matter of public concern. In order to compete effectively, alternative schools must be able to inform parents and students of the full range of programs they offer: academic, extracurricular, and financial aid, and parents and students need all of this information to be able to make informed choices. The flow of information from schools to parents, as decision-makers, is essential to enable them to make informed school choices about both which school their child should attend and the options available at the school that is ultimately selected. *See* 304 F. Supp. 2d 981, 989).

As the district court said in its decision at an earlier phase of this case, "In the competition among schools for students, the First Amendment prohibits the State from favoring one side of

the debate by suppressing the speech of the other." *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 13 F.Supp.2d 670, 689 (M.D. Tenn. 1998); *see also, Turner Broadcasting System. Inc. v. Federal Communication Commission*, 512 U.S. 622 (1994). It is not only not the business of the State to stifle speech that fosters competition among schools for students, it is contrary to government policy and sound educational practice.

Where school choice is involved, as here, there must be particular concern for those persons pre-enrollment messages are designed to reach: the parents and students. Listeners, as well as speakers, have First Amendment interests that are to be protected. *See, e.g., Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

The flow of information from schools to parents, as decision-makers, is very important to making informed school choices about both which school their child should attend and the options available at the school that is ultimately selected. *See* 304 F. Supp. 2d 981 at 989). The flow of information is important in another respect: charter school legislation in many states requires the charter school to reach out to the community so that the student body reflects the cultural and ethnic diversity of the population the charter serves. *See, e.g.*, New Jersey Charter School Program Act of 1995, N.J.S.A. 18A:36A-8(e).

B. The Recruiting Rule Is Not a Content-Neutral Restriction on Speech

A content-neutral regulation controls the time, place, or manner in which the message is communicated. A content-based regulation controls speech based on what is said. The Recruiting Rule is not content neutral for a number of reasons.

Rules selecting which speakers may address a topic are content-based because they favor one side of the debate by suppressing the speech of the other. The First Amendment prohibits the government from doing this. *First Nat. Bank of*

Boston v. Belotti, 435 U.S. 765, 784-85 (1978) (the state may not dictate "who may address a public issue"); *Hurley* v. *Irish American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995) (rule regarding the selection of speakers or participants in the parade is a content-based regulation of speech because a parade is a form of speech); *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 640-41.

Further, the Recruiting Rule discriminates against alternatives to traditional district high schools. The Rule and the Guidelines permit traditional district high schools to communicate with incoming students, but silences non-traditional schools. The Rule, as interpreted in the Guidelines, precludes pre-enrollment contact with incoming students except "except where there is a 'definite feeder pattern." *See* "examples" 3, 4, 5 and 7, quoted verbatim at 304 F. Supp. 2d 981, 985). The preference for schools with a "definite feeder patter" permeates the Rule and the Guidelines. Non-traditional schools do not have a "definite feeder pattern."[9]

The Sixth Circuit's reasoning that the Rule was not content-based because while coaches are subjected to special

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[9] While the "examples" may appear to impose similar restrictions on traditional public high schools and independent, parochial or non-traditional public high schools such as charter schools or magnet schools (*See* "example" 4: "Public high schools may contact public feeder schools (elementary, middle school, junior high school. Question and answer "5" is even more explicit: "Q. What is allowed by member schools in contacting prospective students? A. A representative of the school may meet with students at a school that is defined as a feeder school or meet with students who are zoned to attend that school the following year...." "Guidelines for Understanding The 'Recruiting Rule' and Understanding 'What Is Undue Influence?.'") where there is a definite feeder pattern.") In fact there is disparate impact, because independent, parochial or non-traditional public high schools generally do not have a "definite feeder pattern," either because they do not draw their students from defined geographic districts or particular middle schools, or because they (especially charters) are often only recently established.

limits on their speech, they are not completely deprived of the ability to communicate with students:

> Although the rule emphasizes that coaches and members of the coach's staff must refrain from exerting "undue influence" by initiating contact with prospective students, the rule does not ban these persons from communicating with students who themselves initiate contact.

262 F.3d 543, 553.

This reasoning is flawed on several levels. As an initial matter, the commentary to the Rule is not at all clear that only coaches are restricted.[10] It is also not clear whether coaches are permitted even to respond to queries from prospective students. More fundamentally, even if coaches are permitted to respond to questions from students or parents, their inability to say anything about the availability of financial aid without first being asked remains a substantial barrier to meaningful communication. The Rule singles out coaches for more onerous restrictions than others, and the imposed special restrictions on coaches are directly related to their special familiarity with the schools' athletic program.

A rule is also content-based if it prohibits all discussion of a topic or subject, regardless of the speakers' point of view. *See Consolidated Edison Co.* v. *Public Service Commission*, 447 U.S. 530, 537 (1980); *Arkansas Writers Project, Inc.* v. *Ragland*, 481 U.S. 221, 229-30 (1987).

As interpreted in the Guidelines, the Rule bars any school representative from initiating any discussion with any prospective student if it is "for athletic purposes" and explicitly prohibit coaches from "discussion of financial aid based on

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[10] Several of the interpretive examples refer to coaches and "representatives" of schools.

need" with a prospective student until the student has been at the school for at least three days.[11, 12]

The text of the Rule and the Guidelines make it clear that the Rule is designed to preclude discussion of particular topics. Whether a school representative may speak to a prospective student depends on whether that speech is related to recruitment or athletics. The Rule is explicitly concerned with limiting schools' ability to "secure or retain" students "for athletic purposes." The trial court found that

> the preponderance of the credible evidence at trial is that the substantive "content" of the Spring Practice Letter and calls mattered and was a significant factor in the TSSAA's decision that the letter and calls constituted "undue influence" and violated the Recruiting Rule. The TSSAA penalized Brentwood Academy for the substantive "content" of the Spring

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[11] Question 4, Examples 3, 4 and 5 apply to coaches and "representatives" of a school. Example 2 in the Guidelines states: "Discussion of financial aid based on need with any prospective student/athlete by any member of the coaching staff until the student has enrolled in school (attended 3 days of school). All financial aid questions should be referred to the principal or the person in charge of financial aid. If the person in charge of financial aid is a coach, prior approval must be granted by the Executive Director of TSSAA." 304 F. Supp. 2d 981, 985.

[12] The Court of Appeals was mistaken in stating that the Rule was saved because it "does not constitute a total ban on communications between secondary schools and prospective students regarding athletic programs.262 F.3d 543, 552. *See United States* v. *Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000) "[i]t is of no moment that the [rule] does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree . . . . [C]ontent-based burdens must satisfy the same rigorous scrutiny as . . . content-based bans."

> Practice Letter and calls and the message they conveyed in this case.

304 F. Supp. 2d 981, 992 n. 4. The district court was correct.

Finally, a rule adopted in part to avert a potential effect on listeners of the regulated speech is content-based (even if it does not prohibit particular speakers, topics, or viewpoints). *See Forsyth County* v. *The Nationalist Movement*, 505 U.S. 123, 134 (1995); *United States* v. *Playboy Entertainment Group, Inc.*, 529 U.S. 803, 811 (2000). So long as the regulation "has to do with" the content of the speech, it is not content-neutral.[13]

This case is even more compelling than *Forsyth County* because the Rule was adopted explicitly to prevent parents and students who hear it the proscribed speech from being "unduly influenced" by the banned speech (*see* 304 F. Supp. 2d 981, 984; 442 F.3d 410, 416-417), not on a "secondary effect" of the speech.

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[13] In *Forsyth County*, the parade ordinance permitted a government administrator to base the parade permit fee on the estimated cost of maintaining public order. This Court held that the ordinance was content-based because the fee was based on the public's reaction to the message conveyed by the parade.

> The fee assessed will depend on the administrator's measure of the amount of hostility likely to be created by the speech based on its content. * * * [P]etitioner . . . contends that the ordinance is content neutral because it is aimed only at a secondary effect -- the cost of maintaining public order. It is clear, however, that, in this case, it cannot be said that the fee's justification has nothing to do with content.

Forsyth County, 505 U.S. at 134 (internal citations and quotations omitted).

The effect of a total ban on pre-enrollment speech by "the coaching staff **or** representative of the school"[14] could hardly be more draconian. On its face it prevents students and their parents from learning much about a school's athletic program[15] and the availability of financial aid. In short it prevents parents and students from getting information that is essential to enable them to decide if a school is right for them.

C. The Recruiting Rule Cannot Withstand Strict Scrutiny

Content-based restriction of speech are "presumptively invalid," *R.A.V.* v. *St. Paul*, 505 U.S. 377, 382 (1992). In order to overcome the presumption of invalidity, a state must show "that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Arkansas Writers' Project, supra*, 481 U.S. 221, 231 (1987). To be "narrowly drawn," the law must be the "least restrictive means" to further the government's articulated interest. *Sable Communications of California, Inc.* v. *Federal Communications Commission*, 492 U.S. 115 (1989).

1. The Governmental Interest

The district court concluded that there were three state interests supporting the Recruiting Rule: (1) "keeping high school athletics 'in their proper place' subordinate to academics"; (2) "protecting athletes from 'exploitation'"; and

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[14] "Representative of the school" is not defined, but it certainly could include the academic and administrative personnel, *i.e.* those with the most knowledge about the school's academic and extra-curricular programs.

[15] It would also preclude telling the not-yet-enrolled student at a "non-feeder" junior high or middle school or her parents about the school's special academic offerings, such as advanced placement courses, or non-athletic extracurricular opportunities, such as theater, music, debate or other groups, or externship programs, since those might be deemed designed to entice a prospective student-athlete to enroll in that particular school.

(3) "fostering a 'level playing field' between schools for 'competitive equity.'" 304 F. Supp. 2d 981, 994.

In determining the actual governmental interest, and whether that interest is substantial, a court must focus on the "actual interests served by the restriction." *Edenfield v. Fane,* 507 U.S. 761, 768 (1993). The district court held that the TSSAA has a substantial governmental interest in ensuring that high school athletics be "subordinate to education" and in protecting student athletes from "exploitation."

304 F. Supp.2d 981, 994.[16]

The District Court concluded:

> The TSSAA does not have a substantial governmental interest in preventing or discouraging students from moving from one school to another for academic or educational purposes, in whole or in part, in order to foster competitive equity in athletic contests.

304 F. Supp. 2d 981, 994. The Court of Appeals essentially agreed with the trial court's analysis and conclusions regarding the scope of the government's substantial interest. *See* 442 F.3d 410, 426-429.

Two significant government interests are presented: protecting students in their pursuit of education in a particular environment and protecting the free flow of information so that the selection of the most appropriate educational environment can be made by students and parents. Applying intermediate scrutiny, the trial court and the Sixth Circuit Panel agreed that,

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[16] While the District Court held that the TSSAA's interest in fostering a "level playing field" was a legitimate governmental interest, it found that this interest was not substantial, especially because "[t]he substantial governmental interest in informed school choice trumps any governmental interest in controlling which schools or teams win athletic contests." 304 F. Supp. 2d 981, 994.

as applied to Brentwood under the facts of this case the Recruiting Rule was unconstitutionally overboard.

2. The Recruiting Rule is Not Narrowly Tailored

Assuming for the purpose of this case that the Recruiting Rule is content neutral[17], that Rule is nevertheless

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[17] At an earlier stage in this case, the Sixth Circuit had held that the Recruiting Rule was "content neutral." 262 F.3d 543, 554 (6th Cir.2001); *see also* 442 F.3d 410, 421.

In its initial determination that the Recruiting Rule is content neutral, the Court of Appeals misinterpreted the language of the Rule, and found that the "greatest restriction" imposed is the "prohibition on coaches, coaching staff, and school representatives from initiating contact with middle school students for the purpose of recruiting students athletes. (262 F.3d 543, 552 (emphasis added).) So interpreted (or tailored) by that court, the ban on "initiating conduct" could pass muster because there are "multiple ways of communicating with middle school students to provide them with information about the academic, athletic and spiritual aspects of the education experience at Brentwood." *Id.*

There are several problems with the Sixth Circuit's approach beyond its dismissive treatment of "undue influence."

First, the Rule is not merely designed to prohibit or limit "initial" contact. The "recruiting rule" itself does not even mention "initial contact." The "Guidelines for Understanding The 'Recruiting Rule' and Understanding 'What Is Undue Influence?'" explicitly states:

> 1. The major theme of the "recruiting rule" is not "initial contact." The major theme is "exceeding what is normal and appropriate." Initial contact can be a violation, but is only one of many things that can exceed what is normal and appropriate.

The Circuit Court disregarded this language. Moreover, Question 5, Guideline 4 is explicit that "Pre-arranged contact [between any representative of a school and any prospective student] is seen in the same manner as initial contact." 304 F. Supp. 2d 981, 986.

(continued...)

constitutionally infirm. Content-neutral regulations will be sustained only "if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of [government's legitimate] interest." *United States v. O'Brien,* 391 U.S. 367, 377 (1968). The Rule is not narrowly tailored because it burdens "substantially more speech than is necessary" to further the government's interest in keeping athletics subordinate to academics and in preventing exploitation of student-athletes. *See Ward v. Rock Against Racism,* 491 U.S. 781, 799 (1989); *see also Thompson v. Western States Medical Center,* 535 U.S. 357, 373 (2002).

TSSAA's legitimate interest in keeping athletics subordinate to academics and preventing exploitation of student-athletes could be better served by means less intrusive on speech than the Recruiting Rule ban, such as requiring parental consultation and consent, review of the student's academic record by coaches together with other members of the faculty or school administration, establishing a meaningful minimum grade-point average for eligibility to engage in intermural sports, etc.

The Rule's ban on any contact with a student before the student has actually attended three days of class (see 304 F.Supp.2d at 986) has the effect of preventing a school other

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[17](...continued)

Second, as read by the Sixth Circuit panel, the Recruiting Rule is irrelevant to the Brentwood Spring Practice Letter and the phone calls because there had been substantial contact between the school and the 12 students long before the coach's letter.

Third, as read by the Court of Appeals panel, most of the Rule's content related proscriptions would be eliminated after some "initial" contact initiated by parents or students, or, perhaps, even the headmaster or academic staff of the school, rather than the coach. Such a rule makes no sense in light of the governmental interest in ensuring primacy of academic pursuits and avoidance of exploiting students, and provides opportunities for subterfuge.

than a traditional district school with a "feeder pattern" from giving any information about its programs to a student, and does not merely prevent "undue" influence. The ban is simply not the "least restrictive means" for preventing harm to student-athletes.[18]

The dimensions of the type of recruiting rule suggested by the District Court (*see* 13 F.Supp.2d 670, 690) would serve the dual governmental interests of protecting free communication from educators while controlling disruptive athletic recruiting which could detract from the primacy of schools' education focus.

The state's interest in keeping athletics subordinate to academics and its interest in preventing the exploitation of students are undoubtedly compelling. But the Recruiting Rule is not narrowly drawn to fit either of these interests.[19] The Recruiting Rule is hardly the least restrictive means to further the state's interests in keeping athletics subordinate to academics and in preventing the exploitation of students.

There are many alternatives that would be more narrowly drawn, and some that would not burden speech at all. Indeed, TSSAA already has rules and guidelines that serve the state's legitimate interests. TSSAA has banned spring practice for incoming students. *See* 442 F.3d at 410. The Recruiting Rule prohibits fraudulent, coercive or harassing conduct, such as "offering an incentive or inducement to a student." *See* 304 F. Supp. 2d 981, 984, 985. Other rules restrict current high school

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[18] The Court of Appeals observed that the fact that the rule was subsequently changed to prevent participation in spring practice by students who were not yet attending the school "bolsters the conclusion that the TSSAA's punishment of Brentwood in this case was not narrowly tailored. 442 F.3d 410, 429.

[19] The "D-" requirement of the current TSSAA rules (*see* 442 F.3d 410, 418) is ludicrous, and shows that in fact TSSAA does not really exalt academics over athletics.

students' ability to transfer to other schools for athletic purposes by limiting their athletic eligibility and by making schools forfeit games in which ineligible students participate. *Id.*

Another TSSAA rule provides that "[s]tudents shall be regularly enrolled, in regular attendance, and carrying at least five full courses." At present, students must earn at least a "D-" in all of their courses to be eligible for inter-school athletic competition. *See* TSSAA Bylaws, under Article II (Eligibility Rules), Section 1 (Academic Rules), described at 442 F.3d 410, 418. TSSAA could have ensured the subordination of athletics to academics and prevented the exploitation of students not by inhibiting information about the school, but by requiring better academic performance from student-athletes as a condition of eligibility.

As the district court observed, "...the Rule's ban has the effect of preventing *any* influence on a student, not just "undue" influence. The ban is simply not the "least restrictive means" for preventing harm to student-athletes." 13 F.Supp.2d 670, 690.

The Recruiting Rule's ban on speech to parents deserves special emphasis in any discussion of its overbreadth. It is troubling enough to argue that children must be sheltered from information about their educational options, but it is especially offensive to conclude that the First Amendment permits a state actor to insist that parents must be left ignorant of such options.

There is no justification for proscribing and penalizing Brentwood's communication about a permissible activity. The Rule "stifles speech on account of its message. . .[and] pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion." *Simon & Schuster, Inc, v. Members of State Crime Victims Bd.*, 502 U.S. 105(1991).

The "initial contact" approach which the Sixth Circuit devised fails to address the kind of recruiting the District Court properly found to be offensive and would create an arbitrary and possibly insurmountable barrier to non-traditional schools' efforts to get their message to parents and prospective students. The Rule as rewritten by the Circuit Court would be particularly harmful to charter schools and other alternative schools. Many parents, particularly in poor urban areas (where charter schools and magnet schools are very often established), do not see or hear, nor do they respond to, advertisements or general dissemination of information about educational choices. The very notion of choice in education is foreign to many prospective charter parents. Banning or limiting "initial" contact by a representative of the school would have a serious chilling effect on enrollment and the character of the student body charters and other alternative schools seek. (*See* the expert testimony at trial, summarized by the district court, 304 F.Supp.2d 981, 991.)

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No. 06-427

IN THE

Supreme Court of the United States

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION,

Petitioner,

v.

BRENTWOOD ACADEMY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INTEREST OF AMICUS CURIAE

Pursuant to Rule 37.3 of this Court, the Institute for Justice (the "Institute") respectfully submits this amicus curiae brief in support of Respondent Brentwood Academy.[1] The Institute is a nonprofit public interest legal center dedicated to defending the essential foundations of a free society: private property rights, economic and educational liberty, and the free exchange of ideas.

The Institute litigates First Amendment cases throughout the country and files amicus curiae briefs in cases on behalf of individuals whose right to speak and associate has been infringed by the actions of the government, including *Randall v. Sorrell*, __ U.S. __, 126 S. Ct. 2479 (2006), *Wisconsin Right to Life, Inc. v. Federal Election Commission*, 546 U.S. 410 (2006), and *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003). The Institute also represents beneficiaries of school choice programs and represented a group of Petitioners in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (upholding Cleveland school voucher program) and the Petitioners in *Anderson v. Town of Durham*, 895 A.2d 944 (Me. 2006), *cert. denied*, __ U.S. __, 127 S. Ct. 661 (2006). The Institute believes that its legal perspective and experience will provide additional considerations regarding this issue that are not contained in the briefs of the parties.

INTRODUCTION

The Tennessee Secondary School Athletic Association ("TSSAA") enacted a rule that banned schools from exerting "undue influence . . . to secure or to retain a student for athletic purposes." ("Recruiting Rule"), Joint Appendix ("JA") 181 (Feb. 20, 2007). TSSAA formally interpreted the Recruiting Rule to forbid "any initial contact or prearranged contact by a member

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1. Pursuant to Rule 37.1 of the Rules of the Supreme Court of the United States, Amicus states that no counsel for any party to this case authored this brief in whole or in part, and no person or entity other than Amicus made any monetary contribution to the preparation or submission of this brief. Amicus has sought and received consent from counsel to both parties to submit this brief.

of a coaching staff or representative of the school and a prospective student/athlete." JA 182. The Brentwood Academy ("Brentwood") football coach contacted all eighth grade boys who had chosen to enroll in Brentwood for the following school year, inviting them to observe a spring football practice. JA 119, 219-20. TSSAA ultimately decreed that Brentwood had violated the Recruiting Rule and imposed a substantial sanction. JA 243.

This Court's First Amendment jurisprudence has proceeded, for some time, down a troubling path of sorting speech into narrow subcategories. *See, e.g., Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). In addition to producing unnecessary doctrinal complexities, this approach has inevitably led to *less* protection for core speech. Seeking to further expand this compartmentalized approach, Petitioner alternatively asks this Court to relegate Brentwood's speech to the standard of review applicable to government employees, participants in government-funded programs, or recipients of government benefits—essentially any standard that enables TSSAA to obtain deference. Brief for Petitioner 20-21, 23, 27, 32 (Feb. 20, 2007) ("Pet'r Br.").

The district court and court of appeals, for different reasons, properly found that the Recruiting Rule infringed Brentwood's First Amendment right to free speech. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 13 F. Supp. 2d 670 (M.D. Tenn. 1998), *aff'd on other grounds*, 442 F.3d 410 (6th Cir. 2006). That is, although the two courts differed as to whether the Recruiting Rule was content-neutral or content-based—and therefore as to the applicable level of scrutiny—there was unanimity on the central question before this Court: whether TSSAA can avoid the rigors of First Amendment scrutiny altogether. Amicus strongly believes that this Court should firmly reject TSSAA's attempt to displace traditional First Amendment review by analogizing to existing exceptions or,

as the United States suggests, by creating a new "voluntary association" exception.

That Petitioner is leery of traditional First Amendment scrutiny is not surprising. The Recruiting Rule is a naked content-based restriction on speech. *See United States v. Playboy Entm't Group*, 529 U.S. 803 (2000). The Recruiting Rule is completely indifferent to the time, place, or manner of communication between secondary schools and prospective students (and their parents). TSSAA has enacted a rule that targets certain speech—*i.e.*, speech associated with athletics—for disfavored treatment. There simply is nothing "neutral" about the Recruiting Rule.

Petitioner's retreat to the more deferential standards of review noted above misses the mark. The test articulated in *Pickering v. Board of Education of Township High School District 205*, 391 U.S. 563 (1968), applies only to the government's ability to regulate the speech of its employees, while the standard articulated in *Rust v. Sullivan*, 500 U.S. 173 (1991), applies to those who participate in government-funded spending programs. Each of these deferential standards was crafted to fit unique circumstances entirely dissimilar to the present case. As this Court already has determined, TSSAA exercises the governmental authority of the State of Tennessee in overseeing state-sanctioned interscholastic athletics. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 291 (2001). Private citizens do not lose their First Amendment rights by acknowledging the authority of a State licensing or regulatory board such as TSSAA. *See Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, Bd. of Accountancy*, 512 U.S. 136, 143 (1994).

Last, TSSAA's desire to cast the Recruiting Rule as the only means available for vindicating the legitimate interest in preventing schools from exercising "undue influence" over potential students lacks any basis in fact or law. In championing this dubious proposition, TSSAA fails to account for the impact the Recruiting Rule will have on speakers and listeners. The

rule not only blocks the free flow of information, an important First Amendment value, but also violates Brentwood's ability to reach its intended audience and the recipient's interest in receiving this truthful message. *See Martin v. Struthers*, 319 U.S. 141 (1943). It thus shuts down an important—and in some cases the only—avenue of communication between schools and prospective students and their parents.

In so doing, the Recruiting Rule undermines informed educational choice. *See Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925). Preventing informed educational choice, unfortunately, may well be Recruiting Rule's animating principle. As TSSAA's reliance on "competitive equity" reveals, the Recruiting Rule appears to reflect an interest in subordinating the State's educational mission to the interest of the public school establishment in greater athletic parity—*i.e.*, ensuring that public school athletic teams fare better on the playing field by retaining better athletes—whether it is in the students' long-term interest or not. Competitive equity thus not only forces students to stay in schools that have failed them, but also runs counter to the educational mission of the State. The judgment of the Sixth Circuit should be affirmed.

ARGUMENT

I. TSSAA'S REGULATION OF FREE SPEECH IS SUBJECT TO EXACTING SCRUTINY UNDER THE FIRST AMENDMENT.

A. The Court Should Reject Any Attempt to Further Erode First Amendment Scrutiny.

Petitioner asks this Court to pigeonhole Brentwood's truthful speech into one deferential First Amendment standard or another. To that end, Petitioner and supporting amici offer the Court a menu of options—other than exacting review—to shield the Recruiting Rule from any serious examination. This Court should reject Petitioner's invitation to invent new subcategories of speech and relegate them to less than full First Amendment protection. *NAACP v. Button*, 371 U.S. 415, 429 (1963) ("[A] State cannot foreclose the exercise of constitutional

rights by mere labels."); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 519 (1981) ("[D]emocracy stands on a stronger footing when courts protect First Amendment interests against legislative intrusion, rather than deferring to merely rational legislative judgments in this area.").

Freedom of speech is "the matrix, the indispensable condition, of nearly every other form of freedom." *Palko v. Connecticut*, 302 U.S. 319, 327 (1937); *see also Thomas v. Collins*, 323 U.S. 516, 530 (1945) ("[P]referred place [is] given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment."). The Framers, "[b]elieving in the power of reason as applied through public discussion, . . . eschewed silence coerced by law—the argument of force in its worst form." *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring). Indeed, "[t]here is little need to reiterate that the freedoms of speech and of the press rank among our most cherished liberties . . . . The durability of our system of self-government hinges upon the preservation of these freedoms." *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 381-82 (1973). In many ways, the entire enterprise of judicial characterization and ranking of various types of speech is inconsistent with the marketplace-of-ideas theory behind the First Amendment. Value should be assigned by the collective body of listeners, not by any branch of state or federal government. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 791-92 (1978) ("[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments.").

Over time, however, this Court's jurisprudence has moved toward this compartmentalized approach to government restrictions on free speech. *See, e.g., United States v. O'Brien*, 391 U.S. 367 (1968) (content-neutral regulations); *Miller v. California*, 413 U.S. 15 (1973) (lower-value speech); *Cent. Hudson Gas. & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980) (commercial speech); *FCC v. League of Women*

Voters of California, 468 U.S. 364 (1984) (unconstitutional conditions); *Rust v. Sullivan*, 500 U.S. 173 (1991) (government speech); *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563 (1968) (public employment); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (government as educator); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983) (government as proprietor); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) (public airwaves); *United States v. United Foods, Inc.*, 533 U.S. 405 (2001) (compelled speech).

Categorizing speech into hierarchical categories inevitably increases the danger that speech as a whole will not receive the robust protection the First Amendment was adopted to guarantee. *Tucker v. Cal. Dep't of Educ.*, 97 F.3d 1204, 1209 (9th Cir. 1996) ("Although we must look to the most appropriate precedent and doctrine, we are also aware of the dangers of reducing the First Amendment to a series of doctrinal cubbyholes and of warping different fact situations to fit into the boxes we have created."); *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 504 (1997) (Thomas, J., dissenting) ("I continue to disagree with the use of the *Central Hudson* balancing test and the discounted weight given to commercial speech generally."). Indeed, classifying speech into these narrow categories generally has led to *less* protection for private speech. Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 GEO. WASH. L. REV. 298, 322 (1998) ("Intermediate scrutiny is not a deeply principled, highly theorized response to problems of constitutional law. It is instead a compromise position that lies between two more-or-less theorized and principled poles."); *cf. Craig v. Boren*, 429 U.S. 190, 221 (1976) (Rehnquist, J., dissenting) ("[T]he phrases used are so diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particular types of legislation, masquerading as judgments whether such legislation is directed at 'important' objectives or, whether the relationship to those objectives is 'substantial' enough.").

Petitioner and amici seek to exploit the uncertainties inherent in this compartmentalized approach by advancing a scattershot of theories why Brentwood is not entitled to the full protection of the First Amendment. Pet'r Br. 20-21, 23, 27, 32 (arguing alternatively for the applicability of unconstitutional conditions, public employment, educational, and government-funded speech standards of First Amendment review). Worse still, Petitioner and its amici do not even settle on a particular category of lesser-protected speech, thus underscoring the doctrinal confusion engendered by the very hierarchy-of-speech framework they advocate. This unwillingness to settle on any existing First Amendment paradigm reflects a greater interest in obtaining a deferential standard of review than in a sincere examination of the true nature of TSSAA's ban on speech. Brief for the United States as Amicus Curiae Supporting Petitioner 10 (Feb. 20, 2007) ("No precedent of this Court directly addresses the degree of scrutiny to which restrictions on speech should be subjected in this precise context. Established First Amendment principles point to the conclusion, however, that the restrictions should be reviewed deferentially.").

The Court should reject Petitioner's invitation to expand or contort existing categories of lesser-protected speech to fit the needs of the Recruiting Rule. The right to speak freely should not be dependent on the ability to navigate around an ever-expanding list of exceptions to the general protections of the First Amendment. *See Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 128 (1991) (Kennedy, J., concurring) ("The case before us presents the opportunity to adhere to a surer test for content-based cases and to avoid using an unnecessary formulation, one with the capacity to weaken central protections of the First Amendment."). Truthful speech about athletic and educational opportunities at private schools is in the heartland of what the First Amendment was designed to protect. If the State can muzzle a private academy to "protect" state-run schools from the persuasive

power of that speech, then the State can completely shut down the marketplace of ideas in the entire area of educational choice.

B. TSSAA's Recruiting Rule Is a Content-Based Restriction on Speech.

TSSAA's Recruiting Rule is a content-based speech restriction subject to the most exacting First Amendment scrutiny. The Recruiting Rule provides that "[t]he use of undue influence on a student . . . , his or her parents or guardians of a student by any person connected, or not connected, with the school to secure or to retain a student for athletic purposes shall be a violation of the recruiting rule." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 13 F. Supp. 2d 670, 673 (M.D. Tenn. 1998). TSSAA has interpreted this rule as prohibiting school-initiated contact of any kind on the subject of athletics and as only allowing discussions with prospective students on the subject of athletics "at the request of the family." *Id.* at 674. This rule self-evidently favors certain speech, at the expense of other speech, because of its content. *Id.* at 688 ("The Court finds that the Recruiting Rule ban is content-based because the interests asserted by the Defendants to support the ban focus on the content of the message and the effect of the message on the listener.").

The Constitution abhors content-based restrictions on speech. *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) (reiterating that "government may not regulate speech based on its substantive content or the message it conveys"); *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642 (1994) (explaining that the law applies "the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content").

Content-based restrictions on speech are disfavored for a reason. "Our political system and cultural life rest upon" the

idea that individual citizens can judge for themselves what "ideas and beliefs [are] deserving of expression, consideration, and adherence." *Turner Broad.*, 512 U.S. at 641. Government cannot be allowed to manipulate the range of information available to the public. *See Simon & Schuster*, 502 U.S. at 116 (explaining that content-based restrictions "raise the specter that the government may effectively drive certain ideas or viewpoints from the marketplace"); *Turner Broad.*, 512 U.S. at 641 (content-based restrictions "pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion").

Here, the content-based nature of the Recruiting Rule is readily apparent. TSSAA, a government actor, has determined that it is wise to drive certain ideas—specifically ideas designed to inform students about educational and athletic opportunities—from the marketplace. TSSAA admits as much: in the district court, TSSAA stated that its aim was to prevent schools from treating student-athletes and non-student-athletes differently and to deter them from unduly influencing student-athletes. *Brentwood*, 13 F. Supp. 2d at 688. Such restrictions are based only on the words and message being conveyed, not the time, place, manner, or any other incidental characteristic of their utterance. By its plain terms, the Recruiting Rule applies only to speech designed to "secure or to retain a student for athletic purposes." JA 181; *see Brentwood*, 13 F. Supp. 2d at 688 ("[T]he ban was purportedly enacted to prevent student-athletes from being subjected to the content of the message being conveyed by public and private school representatives outside the student's feeder pattern. TSSAA's purpose in enacting the ban, then, indicates that the ban is not content-neutral.").

Examining a situation in which TSSAA would *not* have enforced the Recruiting Rule confirms the content-based nature of this restriction. If the Brentwood football coach, for example, had sent a letter or had telephoned all male students that had signed enrollment contracts, identified himself, and simply

stated, "We look forward to having you as a student at Brentwood next year," TSSAA would not have taken any disciplinary action. As Ronnie Carter, Executive Director of TSSAA, testified, TSSAA doesn't "have a no coach contact rule." JA 428. Yet the time, place and manner of the above hypothetical communication are identical to those at issue here—all that differs is the content of the communication.

The district court therefore correctly found that "the substantive 'content' of the Spring Practice Letter and calls mattered and was a significant factor in the TSSAA's decision that the letter and calls constituted 'undue influence' and violated the Recruiting Rule." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 304 F. Supp. 2d 981, 991 n.4 (M.D. Tenn. 2003). This is the essence of a content-based regulation of speech. *United States v. Playboy Entm't Group*, 529 U.S. 803, 811 (2000) (explaining that where "[t]he speech in question is defined by its content . . . the statute which seeks to restrict it is content based"); *Carey v. Brown*, 447 U.S. 455 (1980) (striking down restriction where "permissibility of residential picketing . . . depende[d] solely on the nature of the message being conveyed").

While it ultimately rendered the correct judgment, the Sixth Circuit, likening the Recruiting Rule to a zoning regulation, mistakenly classified it as a content-neutral restriction of speech because, in the court's view, "prohibiting coaches from initiating contact with students or their parents prior to enrollment in the school is a limitation on the manner in which secondary schools can communicate with students about their athletic programs." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 262 F.3d 543, 552 (6th Cir. 2001). The Sixth Circuit erred for at least three reasons.

First, the Recruiting Rule does not simply limit the "manner" in which Brentwood could contact prospective students. Rather, it forbids the school from initiating communication with a prospective student with respect to an entire topic—*viz.*, athletics. *Brentwood*, 13 F. Supp. 2d at 673.

The rule, for example, does not limit the hours in which a school may make phone calls or limit initial contact to written communication or require that such contact occur after school hours, all of which would be ways in which a Recruiting Rule could target the time, place or manner in which a message is being communicated rather than the message itself. Instead, all discussion initiated by the school on the subject of athletics is prohibited, no matter when, where, or how conveyed. *Cf. Cook v. Gralike*, 531 U.S. 510, 523 (2001) ("Article VIII is not a procedural regulation. It does not regulate the time of elections; it does not regulate the place of elections; nor, we believe, does it regulate the manner of elections.").

Hence, even if the Recruiting Rule is viewpoint-neutral, it certainly targets speech based on its content. As this Court has explained, "a regulation that does not favor either side of a political controversy is nonetheless impermissible because the First Amendment's hostility to content-based regulation extends . . . to prohibition of public discussion of an entire topic." *Boos v. Barry*, 485 U.S. 312, 319 (1988) (quotation and citation omitted) (omission in original); *see also Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987) ("Arkansas' system of selective taxation does not evade the strictures of the First Amendment merely because it does not burden the expression of particular *views* by specific magazines."); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986) (defining "'content-neutral' speech regulations as those that are *justified* without reference to the content of the regulated speech" (internal citations and quotations omitted)). "[A] content-based blanket restriction on speech . . . cannot be properly analyzed as a form of time, place, and manner regulation." *Reno v. ACLU*, 521 U.S. 844, 868 (1997) (citations and quotations omitted).

Second, the Sixth Circuit erroneously supported its conclusion of content-neutrality by finding that Brentwood retained other means of communicating the availability of educational options to students. *Brentwood*, 262 F.3d at 552 (finding that "prohibiting coaches from initiating contact with

students or their parents prior to enrollment in the school . . . does not mean . . . that Brentwood has no other outlet for providing such information to prospective students, or that middle school students have no way of finding out this information"). This approach is entirely backwards; the availability of alternative avenues is relevant only after a court has already determined that the regulation is content-neutral—not before. *See Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 541 n.10 (1980) (explaining that the Court has "consistently rejected the suggestion that a government may justify a content-based prohibition by showing that speakers have alternative means of expression"); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 n.15 (1976) ("We are aware of no general principle that freedom of speech may be abridged when the speaker's listeners could come by his message by some other means, such as seeking him out and asking him what it is.").[2]

Third, the lower court's theory that the Recruiting Rule is subject to intermediate scrutiny because it primarily regulates conduct and the secondary effects of speech must fail. *Brentwood*, 262 F.3d at 553. The Recruiting Rule focuses on the effects of the protected speech on the listener—not the community writ large. *Brentwood*, 13 F. Supp. 2d at 688. The right to regulate the secondary effects of speech cannot be based on the impact of the proscribed category of speech on the audience, *Boos*, 485 U.S. at 321 ("Listeners' reactions to speech are not the type of 'secondary effects' we referred to in *Renton*."), or other primary effects of the targeted speech, *Playboy*, 529 U.S. at 815 ("We have made clear that the lesser scrutiny afforded regulations targeting the secondary effects of crime or

2. The Sixth Circuit's conclusion that the Recruiting Rule does not effect a total ban also is immaterial. *See Playboy Entm't Group*, 529 U.S. at 812 ("It is of no moment that the statute does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree. The Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans.").

declining property values has no application to content-based regulations targeting the primary effects of protected speech."). Because the Recruiting Rule "focuses *only* on the content of the speech and the direct impact that speech has on its listeners," it "is the essence of content-based regulation." *Id.* at 811-12 (internal quotation and citation omitted). The Recruiting Rule should be analyzed under the most demanding scrutiny available under the First Amendment.

II. TSSAA'S REGULATION DOES NOT QUALIFY FOR ANY SPECIAL EXCEPTION TO STRICT FIRST AMENDMENT SCRUTINY.

A. TSSAA Exercises the Sovereign Regulatory Authority of the State of Tennessee.

TSSAA, like any other official regulatory or licensing board, oversees interscholastic athletics in Tennessee pursuant to the sovereign authority of the State. This conclusion is the necessary result of the Court's determination that TSSAA is a state actor. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 291 (2001). In that decision, this Court explained that TSSAA is a "statewide association incorporated to regulate interscholastic athletic competition among public and private secondary schools," *id.* at 290, and is engaged in "regulatory activity," *id.* at 291. This Court could not have been more clear: TSSAA "has historically been seen to regulate in lieu of the State Board of Education's exercise of its own authority." *Id.*

The factual record also evidences TSSAA's regulatory status. TSSAA's constitution recognizes its plenary authority over all athletic competition in Tennessee, stating that its organizational purpose is "to stimulate and regulate the athletic relations of the secondary schools of Tennessee." JA 134. Indeed, Petitioner and supporting amici repeatedly reference the indispensable role interscholastic athletics play in a well-rounded secondary education. *See* Pet'r Br. 3 (stating that TSSAA is organized to "promote the educational ideals of interscholastic athletics"); JA 134 ("The athletic field and the gymnasium are classrooms in which teaching is foremost in the development

of character, integrity, sportsmanship, and teamwork. Although the athletic program is associated primarily with physical education and the scholastic program with mental education, one complements the other."). This Court has taken TSSAA at its word. *See Brentwood*, 531 U.S. at 300 (explaining that athletics "provide an integral element of secondary public schooling").[3]

TSSAA thus is *not*, as Petitioner suggests, "a voluntary membership organization through which members self-regulate their sports competition and establish common rules to promote the educational ideals of interscholastic athletics." Pet'r Br. 3. That battle has already been lost. *Brentwood*, 531 U.S. at 291 ("We hold that the association's regulatory activity may and should be treated as state action owing to the pervasive entwinement of state school officials in the structure of the association, there being no offsetting reason to see the association's acts in any other way."). TSSAA, as the governing body for Tennessee athletic competition, licenses and regulates all schools that wish to participate in state-sanctioned interscholastic athletics. *See, e.g.*, JA 201 ("The sports season for a school shall end when the team has been eliminated from the TSSAA tournament series or has won the state championship.").

Indeed, TSSAA's monopoly over the governance of state-sanctioned interscholastic athletic competition in Tennessee confirms the pervasiveness of its oversight authority. *See Brentwood* 304 F. Supp. 2d at 997 ("TSSAA is effectively the only game in town."). Because "[a] member school's team may play or scrimmage only against the team of another member, absent a dispensation" and "without any other authority actually regulating interscholastic athletics," *Brentwood*, 531 U.S. at 291,

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3. *See also* Brief of Amicus Curiae of National Federation of State High School Associations in Support of Petitioner 3 (Feb. 20, 2007) ("NFHS views cocurricular activities, including athletics, as an integral part of the high school experience."); *id.* at 4 ("[A]thletics are an extension of the classroom."); TENN. BD. OF EDUC. RULE 0520-1-2-.08(1) (recognizing "the value of participation in interscholastic athletics").

schools are essentially forced to join TSSAA to offer their students the opportunity to participate in interscholastic athletics, *id.* at 299 (explaining that "a pickup system of interscholastic games would not do"). Joining TSSAA is the only means for Brentwood and other secondary schools to offer their students the unique educational experience that comes from participation in interscholastic athletic competition.

Private citizens do not waive their First Amendment rights by voluntarily engaging in an activity that is licensed or regulated by the State. *See Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, Bd. of Accountancy*, 512 U.S. 136, 143 (1994); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977) (employing traditional First Amendment analysis to attorney disciplinary rules that arise only by virtue of their licensure); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 504-505 (1996) (applying commercial speech doctrine to liquor licensing statute); *Va. State Bd. of Pharmacy*, 425 U.S. at 749-50, 762-70 (determining that commercial speech doctrine applies to advertising rule applicable to licensed pharmacists as a condition of their licensure); *Edenfield v. Fane*, 507 U.S. 761, 767 (1993) (applying commercial speech doctrine to ban on certain speech applicable only to licensed CPAs). Indeed, if it were otherwise, the State could vitiate First Amendment protection in any area by adopting an exclusive licensure or membership requirement and then claim a surrender of First Amendment rights due to "voluntary" participation. *See, e.g., City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 763-64 (1988).

In *Ibanez*, for example, an accountant and attorney who voluntarily submitted herself to the regulatory jurisdiction of the relevant state agency was nonetheless entitled to the full protection of the First Amendment. 512 U.S. at 139 & n.3. The Court, employing the traditional First Amendment analysis, held "that the Board's decision censuring Ibanez is incompatible with First Amendment restraints on official action." *Id.* at 139. The import of *Ibanez* and other similar cases is unmistakable: "voluntary association" with the regulatory authority of the State

is not by itself sufficient to remove the case from traditional First Amendment scrutiny. *See, e.g., Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 801 (1988). Those involved in private enterprise always have the choice not to engage in a particular profession or activity for which a license is needed. But this Court has always employed its traditional First Amendment analysis where the maintenance of the license is in some way conditioned on the sacrifice of First Amendment rights. *See, e.g., City of Lakewood*, 486 U.S. at 763-64. This case is no different; TSSAA in effect grants its member schools a license to participate in statewide interscholastic athletics and cannot avoid the strictures of the First Amendment under a newly minted "voluntary association" standard.

B. This Is Not a Public Employment Case.

Petitioner counters that this case is subject to the test set forth in *Pickering*, 391 U.S. 563. Pet'r Br. 27-32. TSSAA misapprehends this entire line of cases. *Pickering*, and its progeny, *Connick v. Myers*, 461 U.S. 138 (1983), and *Board of County Commissioners v. Umbehr*, 518 U.S. 668 (1996), apply only to government employment relationships.

In *Pickering*, this Court addressed the extent to which public employees retain their First Amendment rights. In resolving this question, the Court crafted a balance between the rights of the employee, "as a citizen, in commenting upon matters of public concern and the interest of the State, *as an employer*, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568 (emphasis added). The Court made clear that this balancing approach was legitimate only because the interests of the State as an employer are different in kind from its interests in any other context: "[T]he State has interests *as an employer* in regulating the speech *of its employees* that *differ significantly* from those it possesses in connection with regulation of the speech *of the citizenry in general*." *Id.* (emphasis added); *Waters v. Churchill*, 511 U.S. 661, 674 (1994) (explaining that "constitutional review of *government employment decisions* . . . rest on different principles

than review of speech restraints imposed by *the government as sovereign*" (emphases added)).

Connick and *Umbehr* confirm this understanding. In *Connick*, the Court explained that the *Pickering* balancing test "reflects both the historical evolvement of the rights of public employees, and the common sense realization that government offices could not function if every employment decision became a constitutional matter." *Connick*, 461 U.S. at 143. Accordingly, "when a public employee speaks not as a citizen upon matters of public concern, but speaks instead as an employee upon matters only of personal interest," the First Amendment is not grounds for review of the employment decision. *Id.* at 147. *Umbehr* merely extended the *Pickering* balancing test to independent contractors because of the similarity of functions they and full-time employees perform for the government. *Umbehr*, 518 U.S. at 678 ("We . . . see no reason to believe that proper application of the *Pickering* balancing test cannot accommodate the differences between employees and independent contractors.").

Instead of respecting the natural limits of *Pickering*, Petitioner contorts the Court's reference in *Umbehr* to the government's "contractual power," in forming the employment relationship at issue, to expand the *Pickering* balancing test to entirely dissimilar circumstances. That is, Petitioner's contention that the Court's use of the phrase "contractual power" extends *Pickering*'s balancing test far beyond the employment context, Pet'r Br. 27-28, cannot be correct. Were the Court to expand *Pickering* in such a dramatic way, it would doubtless have made its intention to do so—and thus its intention to trench further on protected speech—far more clear. Instead of the expansive meaning Petitioner proposes, the Court was simply explaining its minor extension of *Pickering* to the independent contractor context. For this reason, this Court has never applied *Pickering* or *Umbehr* outside the employment context. *See, e.g., O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 713 (1996);

L.A. Police Dep't v. United Reporting Publ'g Corp., 528 U.S. 32, 43 (1999); *Texas v. Lesage*, 528 U.S. 18, 21 (1999).

And *Pickering* certainly does not apply in the circumstances presented here. *See Waters*, 511 U.S. at 674-75 ("[T]he extra power the government has in this area comes from the nature of the government's mission as employer. Government agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively and efficiently as possible."). Neither Brentwood nor its employees have been hired by TSSAA to do anything.[4] If *Pickering* now extends to all who voluntarily participate in any government program, the vast majority of the country's population has just suffered a massive diminution in First Amendment rights.

C. Brentwood Is Not Participating in a Government-Funded Program.

Contrary to Petitioner's alternative argument, Pet'r Br. 22-27, this case also bears no relation to the government programs addressed by this Court in *Rust* and *United States v. American Library Association*, 539 U.S. 194 (2003). In both cases, the Court confronted First Amendment challenges to government-funded spending programs. In *Rust*, the plaintiffs challenged a federal funding provision that forbade the use of appropriated funds "in programs where abortion is a method of family planning." 500 U.S. at 178 (quoting 42 U.S.C. § 300a-6). In *American Library Association*, the Court addressed a similar challenge to a federal law that denied funds to any public library that refused to install Internet filtering software. 539 U.S. at 201-202.

4. Were *Pickering* to apply here, it thus would create the anomalous circumstance wherein employees of TSSAA, such as its Executive Director and staff, would have the same First Amendment rights of free speech as schools such as Brentwood. This understanding would completely remove *Pickering* from the employment context and would allow a licensing body, such as TSSAA, to regulate the speech of employees of its regulated entities (and speech of the regulated entity itself) in any number of circumstances. *Pickering* was never intended to have such far-reaching consequences.

The Court rejected both challenges because "[a] refusal to fund protected activity, without more, cannot be equated with the imposition of a penalty on that activity." *Id.* at 212 (quoting *Rust*, 500 U.S. at 193 (internal quotations and citations omitted)). As the Court explained, "when the Government appropriates public funds to establish a program it is entitled to define the limits of that program." *Rust*, 500 U.S. at 194; *Am. Library Ass'n*, 539 U.S. at 203 ("Congress has wide latitude to attach conditions to the receipt of federal assistance on order to further its policy objectives." (citation omitted)). Thus, Congress was "not denying a benefit to anyone, but [was] instead simply insisting that public funds be spent for the purposes for which they were authorized." *Am. Library Ass'n*, 539 U.S. at 211 (quoting *Rust*, 500 U.S. at 196). *Rust* and *American Library Association* stand for the relatively modest proposition that government does not violate the First Amendment when it appropriates funds for a specific purpose.

That rule has no application here. TSSAA is not a government program in the sense that was significant in *Rust* and *American Library Association*. It does not expend government funds, *see Rust*, 500 U.S. at 196, it does not serve as a proprietor of public land, *see United States v. Kokinda*, 497 U.S. 720, 725 (1990), and it does not distribute a public benefit, *see Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 545 (1983). TSSAA, like any other government regulatory or licensing authority, is charged with regulating private conduct—nothing more.

Moreover, this Court made clear that the funding restrictions at issue in those cases were not used as a means of suppressing speech—they were just a refusal by government to fund it. *See Rust*, 500 U.S. at 198 ("Congress has . . . not denied . . . the right to engage in abortion-related activities. Congress has merely refused to fund such activities out of the public fisc . . . ."); *Regan*, 461 U.S. at 545 ("The Code does not deny TWR the right to receive deductible contributions to support its nonlobbying activity, nor does it deny TWR any independent

benefit on account of its intention to lobby. Congress has merely refused to pay for the lobbying out of public monies."). Here, however, Brentwood is not asking the State of Tennessee to fund its speech; it is simply asking that private speech not be suppressed by the State. The distinction is important. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 548-49 (2001) ("Where private speech is involved, even Congress' antecedent funding decision cannot be aimed at the suppression of ideas thought inimical to the Government's own interest.").

Indeed, even the government's use of funding provisions to suppress private speech has been routinely struck down. *See, e.g.*, *League of Women Voters*, 468 U.S. at 400 (invalidating federal law on First Amendment grounds where "a noncommercial educational station that receives only 1% of its overall income from CPB grants [was] barred absolutely from all editorializing" because "such a station [was] not able to segregate its activities according to the source of its funding" and "it [was] barred from using even wholly private funds to finance its editorial activity"); *Velazquez*, 531 U.S. at 548 ("[I]n the context of this statute there is no programmatic message of the kind recognized in *Rust* and which sufficed there to allow the Government to specify the advice deemed necessary for its legitimate objectives.").

In short, the State "cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise." *Velazquez*, 531 U.S. at 547. TSSAA fails to heed this admonition. The State of Tennessee, through TSSAA, has not appropriated funds to advance a programmatic speech-related interest. *Rust* and *American Library Association* therefore are inapplicable. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 442 F.3d 410, 423 (6th Cir. 2006) ("[T]he TSSAA's enforcement of the Recruiting Rule is not a funding program. Nor does it represent government speech. Cases like *Rust* do not govern the present case.").

III. TSSAA'S ATTEMPT TO JUSTIFY ITS SPEECH RESTRICTION FALLS SHORT UNDER ANY STANDARD.

A. TSSAA Gave No Weight to the Impact of the Recruiting Rule on Speakers and Listeners.

Aside from the content-based infirmities discussed above, the Recruiting Rule conflicts with at least two important First Amendment principles. First, it interferes with the "free flow of ideas"—a core First Amendment value. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 252 (1974); *see 44 Liquormart*, 517 U.S. at 512 ("The text of the First Amendment makes clear that the Constitution presumes that attempts to regulate speech are more dangerous than attempts to regulate conduct. That presumption accords with the essential role that the free flow of information plays in a democratic society."); *Houchins v. KQED, Inc.*, 438 U.S. 1, 30 (1978) ("The preservation of a full and free flow of information to the general public has long been recognized as a core objective of the First Amendment to the Constitution."). Indeed, the First Amendment squarely prohibits overbroad restrictions on truthful speech. *Associated Press v. United States*, 326 U.S. 1, 20 (1945) ("[The First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . . .").

Speech regulations therefore must be careful to "leave open ample alternative channels for communication of the information" and should not "unreasonably limit alternative avenues of communication." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (explaining that even content-neutral restrictions must "leave open ample alternative channels for communication of the information" (quotation omitted)). And, when the Court is "not persuaded that adequate substitutes exist for the important medium of speech that [the regulator of speech] has closed off," such regulations are struck down as unconstitutional. *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994).

Here, as noted above, the Recruiting Rule forbids a coach "from contact[ing] a student or his or her parents prior to his enrollment in the school" and prohibits "[a]ny initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/athlete." JA 181-82. It further provides that "[p]rivate or parochial schools may not contact students enrolled at the public schools."[5] JA 183. The Recruiting Rule, under TSSAA's official interpretation, ultimately forecloses *all* means of direct communication between private schools and parents interested in learning more about these alternative educational opportunities. For student-athletes and their families, outreach from a member of the coaching staff, administrator, or teacher at a private school is the natural avenue of communication for learning about educational opportunities at private schools. Indeed, it is perhaps the best or only opportunity to win their attention in many cases.

That students and their families might possibly obtain this message by seeking out private schools and asking them about their message does not save this prohibition from running afoul of the First Amendment. "[T]he First Amendment protects the right of every citizen to reach the minds of willing listeners and to do so there must be opportunity to win their attention." *Hill v. Colorado*, 530 U.S. 703, 728 (2000) (citations and quotations omitted). The Recruiting Rule thus fails to give private schools an adequate opportunity to win the attention of potentially interested students and their families, *see Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984) (explaining that an alternative means

5. In this litigation, TSSAA has taken the position that the Recruiting Rule only proscribes initial contact by a school representative *on the subject of athletics*. *See* JA 428. TSSAA's official commentary to the Recruiting Rule, however, makes clear that it is capable of a far broader application. *See* JA 181-85. Brentwood's First Amendment rights should not depend on TSSAA's temporary decision to enforce the Recruiting Rule, in the context of ongoing litigation, more judiciously than the official commentary indicates it will in the future.

of communication is constitutionally inadequate if the speaker's "ability to communicate effectively is threatened"), and imposes too great a cost on speech, *see Turner Broad.*, 512 U.S. at 663 ("[A]ssuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment.").

Second, TSSAA's Recruiting Rule violates the speech rights of students and their families. The First Amendment affords equal protection to the rights of the willing audience to receive the message. *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982) ("[I]n a variety of contexts the Constitution protects the right to receive information and ideas."). The First Amendment protects all aspects of speech, as both a speaker and listener are required for a message to be delivered. *Martin v. Struthers*, 319 U.S. 141, 143 (1943) ("The right of freedom of speech . . . embraces the right to distribute literature, and necessarily protects the right to receive it." (internal citation omitted)); *Va. State Bd. of Pharmacy*, 425 U.S. at 756 ("[W]here a speaker exists . . . the protection afforded is to the communication, to its source and to its recipients both."). Here, the Recruiting Rule would deprive students and their families of their right to receive valuable information about educational alternatives. *See Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring) ("The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.").

B. TSSAA's Recruiting Rule Undermines Informed Educational Choice.

The Recruiting Rule fails to take into account the paramount constitutional interest in affording parents the opportunity to make informed choices about educational alternatives for their children. *See Troxel v. Granville*, 530 U.S. 57, 65 (2000) ("[T]he interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty

interests recognized by this Court."); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) ("[I]n addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the right[] . . . to direct the education and upbringing of one's children . . . ." (citations omitted)); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925) ("The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only."). For this right to have meaning, it must be exercised through informed choice.

Here, by impairing the free flow of education-related information, the Recruiting Rule inhibits parental autonomy. In particular, forbidding private schools from directly contacting public school students and their families limits the opportunity of parents to learn about the full range of educational options available to them and to select the one that best meets the students' needs. As such, the Recruiting Rule "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Id.* at 534-35.

Apart from protecting parental liberty, informed school choice is an important government interest in its own right. It allows parents to consider the best options for fulfilling the unique educational needs of their children, including the many potential benefits of educational alternatives such as charter and private schools.[6] As two experts testified in this case, "the flow

6. Private schools generally produce better academic performance than public schools, particularly for minority students. *See, e.g.*, Jay P. Greene, Education Myths 150-54 (2005) (summarizing random-assignment studies of voucher programs in Milwaukee, Charlotte, Dayton, New York City, and Washington D.C.); Paul E. Peterson & Elena Llaudet, Harvard University Kennedy School of Government, *On the Public-Private School Achievement Debate* (Aug. 2006), *available at* http://www.ksg.harvard.edu/PEPG/PDF/Papers/PEPG06-02-PetersonLlaudet.pdf; U.S. Department of Education, Institute of (Cont'd)

of information from schools to parents, as decision-makers, is very important to making informed school choices about both where to attend and the options available at the school that is ultimately selected." *Brentwood*, 304 F. Supp. 2d at 989. Based on this expert testimony, the district court correctly found that informed school choice is a substantial governmental interest. *Id.* at 994. Ensuring informed school choice also is instrumental in promoting other important governmental interests, such as racial integration through voluntary means.[7] By preventing private schools from directly contacting public school students and their families, the Recruiting Rule impairs the ability of

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(Cont'd)

Education Sciences, *The Nation's Report Card: Student Achievement in Private Schools* 1, 7-9 (2005), *available at* http://nces.ed.gov/nationsreportcard/pdf/studies/2006459.pdf. Private schools have higher graduation rates than public schools, *see, e.g.*, Jay P. Greene, Manhattan Institute for Policy Research, *Graduation Rates for Choice and Public School Students in Milwaukee* 1, 5, 7 (2004), *available at* http://www.allianceforschoolchoice.org/_docs/grad_rates_milwaukee.pdf, and generally have higher parental satisfaction and parental involvement than public schools, *see, e.g.*, U.S. Department of Education, Institute of Education Sciences, *Trends in the Use of School Choice 1993 to 2003* 6-7 (2006), *available at* http://nces.ed. gov/pubs2007/2007045.pdf. Studies show other benefits as well. *See, e.g.*, William G. Howell & Paul E. Peterson, *The Education Gap: Vouchers and Urban Schools* 185 (rev. ed. 2006) ("Private school students on average experienced less fighting, cheating, disruptive student behavior, property destruction, racial conflict, truancy and absenteeism.").

7. *See also* Brief of the NAACP Legal Defense & Educational Fund, Inc. as Amicus Curiae in Support of Respondents at 25, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, __ U.S. __, 126 S. Ct. 2351 (2006) (No. 05-908), 2006 WL 2927075) ("[O]ffering students some opportunity to choose the school they would like to attend . . . serves the purpose not only of encouraging integration through the voluntary movement of students, but also of providing students with a variety of distinct yet basically equal educational opportunities to suit their needs."). While the NAACP made this assertion in a case involving public school choice, the point applies with equal or greater force in a case involving both public and private educational opportunities.

parents to exercise an informed school choice that might enable their children to realize these benefits and thus improve the educational outcomes for these students.[8]

Further still, the Recruiting Rule operates to the particular detriment of disadvantaged and at-risk students. While low-income and minority families are already disproportionately disadvantaged by underperforming public schools (and are most likely to have interest in educational alternatives such as private schools), *see Zelman*, 536 U.S. at 681-83 & n.7 (2002) (Thomas, J., concurring), they also are least likely to have access to alternative sources of information beyond direct communications from private schools.[9] Eliminating such contact

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8. *See* Brief of Caucus for Structural Equity as Amicus Curiae in Support of Respondents at 23, *Parents Involved in Cmty. Schs.*, 126 S. Ct. 2351, 2006 WL 2882691 ("Research has found that the poverty of a school, far more than the poverty status of individual students, determines educational outcomes, and that impoverished students do better when they live in middle-class neighborhoods and/or attend more affluent schools.").

9. Low-income and minority children, low-income households, households with low educational achievement, and minority households are significantly less likely to have access to the Internet, to have high-speed Internet access in the home, and to read a daily newspaper. *See* U.S. Census Bureau, *Statistical Abstract of the United States*, *Table 1112-Multimedia Audiences-Summary: 2005* (2007), *available at* http://www.census.gov/compendia/statab/tables/07s1112.xls; *Table 1138-Adult Computer and Adult Internet Users by Selected Characteristics: 1995 to 2005* (2007), *available at* http://www.census .gov/compendia/statab/tables/07s1138.xls; Susannah Fox & Gretchen Livingston, Pew Research Center, *Latinos Online: Hispanics With Lower Levels of Education and English Proficiency Remain Largely Disconnected From the Internet* (2007), *available at* http://www.pew internet.org/pdfs/latinos_online_march_14_2007.pdf; Matthew DeBell & Chris Chapman, U.S. Department of Education, Institute of Education Sciences, *Computer and Internet Use by Students in 2003* 6-13 (2006), *available at* http://nces.ed.gov/pubs2006/2006065.pdf; Henry J. Kaiser Family Foundation, *Children, The Digital Divide, And Federal Policy* 1, 2, 11 (2004), *available at* http://www.kff.org/entmedia/upload/Children-The-Digital-Divide-And-Federal-Policy-Issue-Brief.pdf.

as an option further reduces their potential avenues of obtaining information. For this reason, they are not only less likely to find out about educational alternatives, but also less likely to obtain information about scholarships for which their children may be eligible. The Recruiting Rule handicaps disadvantaged students who might otherwise be able to take advantage of the improved academic environment at a private school.[10]

C. Competitive Equity in High School Athletics Is Not a Government Interest Worth Vindicating Under Any Standard.

TSSAA's argument that "fostering a level playing field among its participating schools," Pet'r Br. 6, 34, is an important government interest should be rejected. This Court has never found that promoting "competitive equity"—as Petitioner refers to it—in high school athletics is a substantial government interest, and it should not do so now. TSSAA itself admits that "competitive equity in high school sports is not usually a

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10. Students—particularly minority and low-income students—who transfer from public to private schools because of vouchers and other school choice programs have shown increased academic performance. *See, e.g.*, Greene, Education Myths, *supra* note 6 at 150-54; Caroline M. Hoxby, *School Choice and School Competition: Evidence from the United States*, 10.2 Swedish Econ. Pol'y Rev. 11, 46-50, 65 (2004); Tom Loveless, Brookings Institution, *The 2001 Brown Center Report on American Education: How Well Are Students Learning?* 36 (2001), *available at* http://www.brookings.edu/gs/brown/bc_report/2001/body.pdf; Howell & Peterson, *supra* note 6 at 146-48, 185-87. Researchers at the nation's leading education school, Columbia Teachers College, have also concluded that competition in education improves educational outcomes such as test scores and graduation rates for students in public schools. Clive R. Belfield & Henry M. Levin, National Center for the Study of Privatization in Education, Teachers College, Columbia University, *The Effects of Competition on Educational Outcomes: A Review of U.S. Evidence* (March 2002), *available at* http://eric.ed.gov/ERICDocs/data/ericdocs2/content_storage_01/0000 000b/80/0d/d9/54.pdf.

significant preoccupation of state governments." Petition for Writ of Certiorari 23 (Sept. 25, 2006).

Nevertheless, as evidence that competitive equity in high school athletics is a substantial government interest, TSSAA offers testimony that the absence of competitive equity can produce "resentment," "hard feelings," or the perception "that the deck is unfairly stacked against them." Pet'r Br. 34, 36. The purpose of interscholastic athletics is not to ensure that the best players are evenly divided among the different schools. Athletic competition at the secondary school level—unlike intercollegiate and professional athletics—is supposed to teach larger lessons. *See, e.g.*, Brief of Amicus Curiae of National Federation of State High School Associations in Support of Petitioner 3 (Feb. 20, 2007) ("NFHS views cocurricular activities, including athletics, as an integral part of the high school experience"); *id.* at 5 ("athletics are an extension of the classroom"). As the Sixth Circuit correctly noted, "[s]tate actors may act out of a variety of interests, but only some are substantial." *Brentwood*, 442 F.3d at 427. While promoting "competitive equity" might make interscholastic athletics more pleasant for some participants, it is hardly a core educational purpose that deserves to be elevated to the level of a substantial governmental interest.

As TSSAA revealingly points out, "competitive equity is vital to *interscholastic sports*"—not the primary goal of education. Pet'r Br. 35 (emphasis added). The two should not be confused. Athletic parity is not part of the educational mission of the State. Indeed, TSSAA's own constitution "[r]ecogniz[es] that the primary objective of all secondary schools is to educate youth." JA 134. Thus, when the purported interests of interscholastic athletics conflict with the State's educational charge, the former must give way. Competitive equity is neither essential nor important to the key goal of educating youth.[11]

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11. Likening the Recruiting Rule to a "rule that a coach too vigorously protesting a referee's call will be ejected," Pet'r Br. 1, reflects a sweeping assertion of TSSAA's power to curtail private speech. (Cont'd)

Promoting "competitive equity" appears to reflect an interest of the public school *establishment*—public school administrators, coaches, alumni, and athletic boosters who want to restrict informed choice to achieve a competitive advantage in the marketplace for secondary education. As the district court noted, "Board of Control member Morris Rogers . . . testified in deposition that a purpose of the Recruiting Rule was to protect schools and coaches from other schools taking their students." *Brentwood*, 304 F. Supp. 2d at 994 n.7. Promoting the narrow agenda of public school officials and coaches is clearly not a proper government interest, as it has no relevance to the educational mission of the public school system.

This stated interest in competitive equity also undermines the valid goal of protecting children and their families from undue influence and other interests that TSSAA claims the Recruiting Rule vindicates, such as "ensuring that athletics remain secondary to academics." Pet'r Br. 6. Competitive equity undermines these objectives by subordinating the potential academic benefits of individual students who transfer away from underperforming public schools to the interest of competitive equity in high school athletic competition. *Brentwood*, 304 F. Supp. 2d at 994 ("The substantial governmental interest in informed school choice trumps any governmental interest in controlling which schools or teams win athletic contests. Academics are more important than athletics.").

The stated interest in competitive equity also undermines the interest in "preventing the exploitation of children." Pet'r Br. 6. Competitive equity results in students being kept in underperforming schools merely because of their potential for

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(Cont'd)

Extending the notion of competitive equity in athletic competition beyond ensuring fairness on the playing field itself can quickly lead to absurd results. *See* Casey McNerthney, *Proposed New Rules for Sports Events Mean That Soon Fans Might Not Be Able to Say . . . Boo!*, Seattle Post-Intelligencer, Mar. 3, 2007, at A1 (reporting that the Washington Interscholastic Activities Association "is considering rules for fans that could ban booing").

athletic achievement and not because it is in their best interest—as either a student or an athlete. Promoting "competitive equity" treats students not as individuals with unique academic needs, but as impersonal units of athletic talent to be divided evenly across the schooling system without regard for their educational goals and interests, in effect treating our children as "mere creature[s] of the State." *Pierce*, 268 U.S. at 535.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Sixth Circuit.

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TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION,
Petitioner,

v.

BRENTWOOD ACADEMY,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF *AMICI CURIAE* NATIONAL ALLIANCE FOR PUBLIC CHARTER SCHOOLS AND THE COLORADO LEAGUE OF CHARTER SCHOOLS IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The National Alliance for Public Charter Schools ("NAPCS") is a national nonprofit organization committed to advancing the charter school movement.[1] Originally formed as a coalition of national school reform organizations, the NAPCS is now the nation's leading public charter school support and advocacy organization. The mission of the NAPCS is to increase the number of high-performing public charter schools available to all families, particularly low-income and minority families who currently do not have access to quality public schools. The NAPCS provides assistance to state charter school associations and resource centers, develops and advocates for improved public policies, and serves as the united voice for this large and diverse movement.

The Colorado League of Charter Schools ("CLCS") is a non-profit membership organization founded in 1994 to "serve and support Colorado's charter schools and their students." The League represents its one hundred and thirty member schools (serving over 53,000 students) in a variety of settings and provides technical support and

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[1] The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to this Court's Rule 37.6, *amici* state that no part of this brief was authored by counsel for any party, and no person or entity other than the National Alliance for Public Charter Schools or the Colorado League of Charter Schools or its members made any monetary contribution to the preparation or submission of the brief.

assistance to both existing charter schools as well as groups seeking charter status. Among the League's members are a number of secondary schools that are members of the Colorado High School Activities Association and depend on the continued even-handed regulation of activities under their purview. Any regulatory system that arbitrarily categorizes charter schools differently than traditional public schools is contrary to the protected interests of those schools and their students.

Charter schools are public schools that have the freedom to operate with greater independence than traditional public schools. Charter school administrators, teachers and parents work together to make decisions ranging from budgets to staffing to curriculum that best meets the needs of the student. In exchange for the freedom to innovate, charter schools are held accountable for increased student achievement. Charter schools play a critical role in providing a high-quality option in public education.

The landscape of secondary education has changed dramatically over the past two decades. By way of example, over one million American children currently attend public charter schools. In this regard, parents and prospective students can now choose from a wide variety of educational options in both the public and private arenas. The NAPCS works on behalf of thousands of public charter schools across the United States. The CLCS works on behalf of its one hundred and thirty member charter schools in Colorado. The NAPCS and the CLCS, like the respondent in this case, have a strong interest in preserving and protecting First

Amendment rights of public charter schools and ensuring that prospective students and their parents have access to the information needed to make informed decisions regarding their children's educational opportunities. The legal principles advocated by the Tennessee Secondary School Athletic Association ("TSSAA") in this case unquestionably restrict the rights of everyone but traditional public high schools to convey important information to families and students across the country. In this regard, the First Amendment rights at issue in this case arise in an athletic context but their importance transcends interscholastic sports. Although the NAPCS and the CLCS recognize the value in preventing the exploitation of student-athletes, the TSSAA's role in regulating interscholastic sports cannot and should not be permitted to restrict the free flow of information that is essential for making informed educational choices.[2] The recruitment rule promulgated by the TSSAA is an overly broad restriction on free speech that unnecessarily results in the erosion of the rights otherwise guaranteed by the First Amendment.

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[2] The *amicus curiae* brief of the Association of Christian Schools International addresses in detail the effects that the recruiting rule has in restricting the exchange of information necessary to make real school choice possible.

SUMMARY OF ARGUMENT

This Court previously concluded that the TSSAA is a state actor for purposes of 42 U.S.C. § 1983. *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288 (2001) ("*Brentwood I*"). On appeal after remand, the court of appeals correctly concluded that the recruiting rule enforced by the TSSAA implicated Brentwood's First Amendment rights and was not narrowly tailored to accomplish TSSAA's interests. Petitioner now requests that this Court revisit its decision in *Brentwood I* and reverse its holding by arguing that the TSSAA is not a sovereign State exercising policy power but rather a state actor that asks its members to honor its voluntary contractual obligations. This Court properly concluded in *Brentwood I* that the TSSAA's regulatory authority "may and should be treated as state action owing to the pervasive entwinement of state school officials in the structure of the association." *Brentwood*, 531 U.S. at 290. The TSSAA has not offered any basis for challenging the "entwined" relationship between the TSSAA and the Tennessee State Board of Education. Thus, this Court should not revisit its holding in *Brentwood I* as this Court properly concluded that the TSSAA was a state actor and, in enforcing its athletic regulations, was engaged in state action.

Petitioner further insists that because the restraint on free speech derives from respondent's "voluntary" or "contractual" participation in the TSAAA rather than from the TSSAA's exercise of its sovereign power, the TSSAA should be afforded a more deferential review thus leading to a reversal of

the court of appeals' conclusion that the TSSAA's actions constituted an unconstitutional restriction on the respondent's First Amendment rights. The cases relied upon by the TSSAA in support of its proposition, however, are clearly distinguishable from the case at bar. In correctly recognizing this distinction, the court of appeals noted that "the TSSAA, in administering its rules and regulations and imposing penalties against member schools, acts as a regulator, not as an employer, contractor, or disburser of funds." *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 442 F.3d 410, 424 (6th Cir. 2006). Moreover, the court of appeals properly recognized that the holdings in those cases had limited application and the deferential analysis in those cases was employed to fit the unique circumstances presented in those cases. Accordingly, the court of appeals correctly rejected the distinction advanced by the TSSAA and properly concluded that the TSSAA's exercise of regulatory authority was subject to "intermediate scrutiny" under the First Amendment.

In addition, although the NAPCS and the CLCS believe that the court of appeals properly and correctly determined that the recruiting rule, as applied to respondent, unconstitutionally restricts Brentwood's First Amendment rights, the NAPCS and CLCS also believe that the rule, as written, has a disparate impact on non-traditional public schools and results in the creation of two classes of schools – traditional public schools and everyone else. The recruiting rule broadly prohibits the use of "undue influence" on a student or his or her parents or guardians by "any person connected, or not

connected," with the school to recruit a student for athletic purposes. The TSSAA has asserted three interests as justification for the recruiting rule. The overarching purpose is to avoid "exploitation." The "interpretive commentary" that is used to aid the TSSAA in the interpretation of the recruiting rule, however, contains exceptions that undermine the purported governmental interests in promulgating the rule. More specifically, the rule exempts contact between school representatives and student-athletes "where there is a definite feeder pattern involving the schools." The exceptions to the rule, therefore, permit contact between school representatives and prospective student-athletes in traditional public high schools since traditional public high schools draw their students from certain designated geographical areas thereby qualifying as a "definite feeder pattern involving the schools." Consequently, the rule undermines the bases advanced by the TSSAA for promulgating the rule and, therefore, is not narrowly tailored to further a substantial governmental interest. Moreover, the rule results in disparate treatment for those schools, such as public charter schools, that do not have "definite feeder patterns." Accordingly, a reversal of the court of appeals' conclusion that the recruiting rule violates Brentwood's First Amendment rights will impermissibly restrict the First Amendment rights of the "other schools," such as public charter schools, that do not rely on attendance zones for their enrollment.

ARGUMENT

I. THIS COURT PROPERLY CONCLUDED IN *BRENTWOOD I* THAT THE TSSAA IS A STATE ACTOR AND THERE IS NO BASIS FOR RECONSIDERING *BRENTWOOD I*

This Court previously concluded that the TSSAA is a state actor for purposes of 42 U.S.C. § 1983. *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288 (2001) ("*Brentwood I*"). In its attempt to avoid constitutional scrutiny of its recruiting rule, the TSSAA requests that this Court revisit its holding in *Brentwood I* and overrule its conclusion that the TSSAA is a state actor. Pet. Br. at 46-50. In the event that it fails in its efforts to convince this Court to reconsider its prior ruling, the TSSAA, joined by the Solicitor General as *amicus curiae*, contends that because the relationship between the TSSAA and Brentwood is "contractual" and because Brentwood "voluntarily" agreed to the speech restrictions contained in the rule as a condition of membership, the rule is entitled to a more deferential review and should lead to the reversal of the court of appeals' conclusion that the TSSAA's actions constituted an unconstitutional restriction on the respondent's First Amendment rights. The NAPCS contends that neither of these arguments provides a basis for reversal of this Court's ruling in *Brentwood I* or in a reversal of the court of appeal's decision below.

A. The TSSAA Has Not Provided A Basis For Reconsidering *Brentwood I*

The Court should not revisit its holding in *Brentwood I* that the TSSAA's "regulatory activity [against Brentwood] may and should be treated as state action." *Brentwood*, 531 U.S. at 290. In *Brentwood I*, this Court concluded that the TSSAA, a statewide association incorporated to regulate interscholastic athletic competition among public and private secondary schools, was engaged in state action when it enforced its recruiting rule against a member school (Brentwood). In so ruling, this Court noted that it has treated a nominally private entity as a state actor in a range of circumstances, including when the entity "is entwined with governmental policies" or when government is "entwined in [its] management or control." *Id. citing Evans v. Newton*, 382 U.S. 296 (1966) (holding that private trustees to whom a city had transferred a park were nonetheless state actors barred from enforcing racial segregation because the park served the public purpose of providing community recreation and the municipality remained entwined in its management and control). This Court's holding in *Brentwood I* was based upon such a "pervasive entwinement" of state school officials in the structure of the TSSAA. *Id.* at 291. This Court's well reasoned conclusion was based upon the following facts, which are undisputable: (1) the association has historically been seen to regulate in lieu of the State Board of Education's exercise of its own authority; (2) the association draws its officers from public school officials; (3) the association

derives much of its funding from the dues paid by its public schools and therefore largely provide for the association's financial support; (4) the association's ministerial employees are treated as state employees to the extent of being eligible for membership in the state retirement system; and (5) the State Board of Education repeatedly recognized (and, in 1972, by formal "designation" charged) the TSSAA as the regulator of interscholastic athletics for public and private secondary schools statewide.

The TSSAA has not offered any basis for challenging the "entwined" relationship between the TSSAA and the Tennessee State Board of Education. Instead, the TSSAA urges reconsideration of *Brentwood I* by arguing that the entwinement analysis "is difficult to square with prior precedent." Pet. Br. at 46. However, this Court has relied upon the entwinement analysis on several occasions to support a finding that a private entity qualifies as a state actor for constitutional purposes. *See Evans v. Newton*, 382 U.S. 296, 299 (1966) (holding that "conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action."); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) (concluding that a privately owned restaurant located within a public parking garage was sufficiently involved with state authority to bring its racially discriminatory actions within the proscription of the Fourteenth Amendment). Although the TSSAA contends that "the entwinement inquiry provides no full answer to the ultimate question [as] to whether TSSAA's

enforcement of the recruiting rule against Brentwood 'can fairly be attributed to the State,'" there can be no question that the exercise of regulatory authority (enforcing the recruiting rule) by a state actor such as the TSSAA will and should be attributed to the State. Accordingly, there is no reason to revisit the holding in *Brentwood I* as the closely entwined relationship between the State Board of Education and the TSSAA overwhelmingly established that the TSSAA, as the authorized regulator of interscholastic athletics for secondary schools throughout the State, was operating at all times as a state actor.

B. The TSSAA Is Not Entitled to Special Deference As It Was Acting As a Sovereign In Enforcing The Recruiting Rule

The TSSAA contends that, even if it qualifies as a state actor, it is entitled to special deference in its regulation of its members' speech because the participation of Brentwood and others is "contractual" or "voluntary" in nature. Pet. Br. at 20-32. The TSSAA essentially contends that the TSSAA is not a sovereign State exercising policy power but rather a state actor that asks its members to honor its voluntary contractual obligations and, therefore, the recruiting rule is not an unconstitutional condition. The authority relied upon by the TSSAA in support of adopting a more deferential First Amendment standard is factually distinguishable, is limited in its application, and fails to provide any justification for the departure

from the "intermediate" scrutiny applied by the court of appeals below.

As discussed above, this Court has concluded that the TSSAA is the statewide regulator of interscholastic secondary school athletics in Tennessee. Thus, enforcement of the recruiting rule against TSSAA members such as Brentwood, which constitutes the exercise of regulatory action, is different than a state actor acting as a contract employer, independent contractor or a disburser of federal funds. As a preliminary matter, the court of appeals has correctly noted that "the applicability of the First Amendment to the TSSAA's regulatory conduct does not hinge on whether there was a contract or not." *Brentwood*, 442 F.3d at 423. Even if such a distinction were applicable in this case, the instances in which this Court has applied a more deferential First Amendment analysis were driven by the unique nature of the relationships between the parties that allowed the imposition of conditions on free speech rights. No such unique relationship exists in the present case.

For example, *Pickering v. Board of Education*, 391 U.S. 563 (1968) and *Snepp v. United States*, 444 U.S. 507 (1980) involved the regulation of speech in the context of the government's role as an employer. As this Court noted, "the State has interests as an employer in regulating the speech of its employers that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Id.* at 569. In *Board of County Commissioners v. Umbehr*, 518 U.S. 668 (1996), this Court addressed only the narrow issue of whether

and to what extent, independent contractors with the government are protected by the First Amendment." *Id.* at 685 (emphasizing the "limited nature of our decision today"). As explained in *Umbehr*, "the similarities between government employees and governmental contractors with respect to [freedom of speech] are obvious. The government needs to be free to terminate both employees and contractors for poor performance, to improve efficiency, efficacy, and responsiveness to the public, and to prevent the appearance of corruption." *Id.* at 674. In both *Rust v. Sullivan*, 500 U.S. 173 (1991) and *Grove City College v. Bell*, 465 U.S. 555 (1984), the government was acting as a contractor in a subsidy context and imposed certain limits to the programs accepting such funding. In such federal funding programs, a certain degree of latitude in restricting speech has been permitted because, as pointed out by this Court in *Legal Services v. Velasquez*, 531 U.S. 533, 541 (2001), "when the government disburses public funds to private entities to convey a government message, it may take legitimate and appropriate steps to insure that its message is neither garbled nor distorted by the grantee."

However, as correctly pointed out by the court of appeals below, the present case "does not involve the government as a party in a contractual relationship with an independent contractor" and "there are obvious differences between the TSSAA's role in this case and the government's role as employer." *Brentwood*, 442 F.3d at 422. Likewise, the TSSAA's enforcement of the recruiting rule in the present context does not involve a funding

program and Brentwood's relationship with the TSSAA does not involve its receipt of public funds. Thus, none of the rationales offered in the cases cited by the TSSAA apply to Brentwood in the present case. Instead, TSSAA's role is as a government regulator. Accordingly, intermediate scrutiny should apply to the TSSAA's application and enforcement of the recruiting rule.

C. Brentwood Did Not Waive Its First Amendment Protections By "Voluntarily" Participating in the TSSAA

The TSSAA further insists that because the restraint on free speech derives from respondent's "voluntary" or "contractual" participation in the TSAAA rather than from the TSSAA's exercise of its sovereign power, Brentwood has "effectively waive[d] ... any challenge to the conditions" imposed by the TSSAA. Pet. Br. at 21. However, this Court has cautioned that conditions placed upon benefits offered by a state actor "cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms." *Speiser v. Randall*, 357 U.S. 513 (1958) (invalidating a condition that limited tax exemption availability to war veterans who affirmed that they did not advocate the overthrow of the United States Government by unlawful means). Likewise, in *Legal Services Corp. v. Velasquez*, 531 U.S. 533 (2001), this Court refused to relax its First Amendment analysis based upon the voluntary nature of a federal program that provided funds for legal services for the indigent when Congress imposed conditions on

the states' use of the federal funds. Accordingly, this Court has recognized that an entity's "voluntary" participation does not constitute an implied waiver of its free speech rights under the First Amendment.[3]

Moreover, this Court should refuse to accord greater deference to the TSSAA because, as recognized by the district court "the TSSAA is effectively the only game in town" for high schools seeking to maintain an interscholastic athletic program in Tennessee. *Brentwood v. Tennessee Secondary School Athletic Ass'n*, 304 F. Supp. 2d at 981, 997 (M.D. Tenn. 2003). As such, while the complainants in *Speiser*, *Velasquez*, *Rust*, and *Grove City* may have had a realistic "choice" of not participating in the government programs at issue, Brentwood's participation in the TSSAA is not truly a "voluntary" decision. In this regard, absent similarly state-sanctioned athletic regulators such as TSSAA to choose among, Brentwood (and schools similarly situated in other states with a single state-wide athletic association) cannot realistically pursue other avenues for state sanctioned athletic programs. Accordingly, the regulatory nature of the

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[3] Notably, this Court has recognized that an effective waiver of a constitutional right only occurs where there is an "intentional relinquishment or abandonment of a known right or privilege." *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Board*, 527 U.S. 666, 682 (1999). As recognized by the court of appeals, "the contract [between the TSSAA and Brentwood] gives no guidance as to whether Brentwood waived a right to challenge a rule it considered unconstitutional" and "the contract's silence [therefore] becomes evidence of an absence of waiver of constitutional rights." *Brentwood*, 442 F.3d at 425.

TSSAA coupled with the lack of a true "voluntary" relationship supports the court of appeals' conclusion that the TSSAA is a state actor whose restrictions on First Amendment rights should be subject to intermediate scrutiny.

II. THE TSSAA'S RECRUITING RULE IS NOT NARROWLY TAILORED TO FURTHER GOVERNMENTAL INTERESTS AS IT CREATES TWO CLASSES OF SCHOOLS – TRADITIONAL PUBLIC SCHOOLS AND EVERYONE ELSE

Although the NAPCS and the CLCS believe that the court of appeals properly and correctly determined that the recruiting rule, as applied to respondent, unconstitutionally restricts Brentwood's First Amendment rights, the NAPCS and the CLCS also believe that the rule, as written, has a disparate impact on non-traditional public schools and results in the creation of two classes of schools – traditional public schools and everyone else, including public charter schools. The present case arises from the promulgation and application of a "recruiting rule" contained in the TSSAA bylaws aimed at regulating the attempts of secondary schools to recruit middle school student athletes for athletic programs. The bylaws include a number of questions and answers and guidelines, described as "interpretive commentary," that are used to aid the TSSAA in the interpretation of the recruiting rule. Although the TSSAA contends that the commentary to the anti-recruitment rule is non-binding, Judge Rogers, in his dissenting opinion, properly noted that the

commentary is non-binding "only to the extent that the TSSAA has a certain amount of discretion in enforcing the rule, and the examples cited in the interpretive commentary are a non-exclusive list." *Brentwood*, 442 F.3d at 452, FN 3. One portion of the "interpretative commentary" includes the following questions and answers that address the guidelines to be employed in determining whether there has been undue influence and, hence, a violation of the rule:

4.

Q. What are some of the guides (sic) used in determining whether there has been undue influence used which would result in a violation of the recruiting rule?

A. Some examples are, but not limited to:

* * *

3. Any initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/athlete enrolled in any member school **except where there is a definite feeder pattern.**

4. Any initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/athlete in the seventh grade and above at any non-member school **except where there is a definite feeder pattern.**

* * *

5.

Q. What is allowed by member schools in contacting prospective students?

A. A representative of the school may meet with **students at a school that is defined as a feeder school or meet students who are zoned to attend that school the following year**. This visit must be cleared by the principals of both schools.

Joint Appendix 181 (emphasis added).

The recruiting rule broadly prohibits the use of "undue influence" on a student or his or her parents or guardians by "any person connected, or

not connected," with the school to recruit a student for athletic purposes. The TSSAA has asserted three interests as justification for the recruiting rule: (1) to keep high school athletics in their proper place subordinate to academics; (2) to protect student athletes from exploitation; and (3) to foster a level playing field among the various member schools. In this regard, Ronnie Carter, the Executive Director of the TSSAA, testified that preventing "exploitation" is the "fundamental" purpose of the recruiting rule. *Brentwood*, 304 F. Supp. 2d at 992.

The "interpretive commentary" that is used to aid the TSSAA in the interpretation of the recruiting rule, contains exceptions "where there is a definite feeder pattern involving the schools." In addition, the recruiting rule permits recruiting in situations where students are zoned to attend that school the following year. The exceptions to the rule, therefore, expressly permit contact between school representatives and prospective student-athletes in traditional public high schools since traditional public high schools draw their students from certain designated geographical areas thereby qualifying as a "definite feeder pattern involving the schools" and/or schools whose students are "zoned to attend that school the following year." Consequently, the rule undermines the bases advanced by the TSSAA for promulgating the rule and, therefore, is not narrowly tailored to further a substantial governmental interest. Further, the TSSAA has not provided any reasoned basis for distinguishing between "feeder patterns" and other situations nor has it identified any substantial governmental interest that could conceivably explain the rationale

behind preventing Brentwood from contacting students that have already signed enrollment contracts with Brentwood on the one hand and permitting high school coaches to contact prospective students at "feeder schools" on the other.

Moreover, the recruiting rule results in disparate treatment for those schools, such as public charter schools, that do not have "definite feeder patterns."[4] The district court expressly acknowledged this disparate treatment:

> The failure of the TSSAA to narrowly tailor the Recruiting Rule, as applied in this case, is made further evident by the "feeder pattern" exceptions that exist in the interpretive commentary to the Recruiting Rule. As applied in this case, there is no legitimate reason to permit speech in a feeder pattern but prohibit the same speech by Brentwood Academy to its incoming students. Various witnesses testified how the "feeder pattern" exception for public school is actually used to broadly permit the type of speech for which Brentwood Academy has been sanctioned by the TSSAA. The bottom line is that schools in a "feeder pattern" can make certain school-initiated,

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[4] As noted by the United States Court of Appeals for the Sixth Circuit, the "definite feeder pattern" exception does not apply to Brentwood, except with regard to those students who are enrolled at Brentwood Academy itself in the sixth grade or higher. *Brentwood*, 442 F.3d at 417.

> targeted speech that schools, such as Brentwood Academy, outside the "feeder pattern," cannot make.

Brentwood, 304 F. Supp. 2d at 995-96. Thus, the rule creates two different classes of schools, traditional public schools and everyone else. In the former class, the rule expressly permits recruiting while in the later class, the rule prohibits such recruiting activities.

The disparate treatment that results from enforcement of such a rule affects a significantly large portion of students in the United States. Notably, over *one million students in the United States attend public charter schools*. These charter schools generally do not rely on attendance zones for their enrollment. Hundreds of thousands of other students attend private schools that likewise do not rely on attendance zones for their enrollment. As explained above, the recruiting rule impermissibly restricts the ability of non-traditional public schools (public charter schools, private schools, etc.) to attract students to their schools by placing unconstitutional restrictions on the nature and type of information that can be disseminated to millions of students that may be interested in attending non-traditional public schools. As discussed in more detail in the *amicus curiae* brief of the Association of Christian Schools International, although the recruiting rule arises in the athletic context, the First Amendment rights at issue in this case transcend interscholastic sports. Accordingly, a reversal of the court of appeals' conclusion that the recruiting rule violates Brentwood's First

Amendment rights will impermissibly restrict the First Amendment rights of the "other schools," such as public charter schools, that do not rely on attendance zones for their enrollment and effectively create two different classes of schools - traditional public schools and everyone else.

CONCLUSION

For the foregoing reasons and for the reasons set forth in Respondent's brief, the decision of the court of appeals should be affirmed.

Dated: March 27, 2007.

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In The
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TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION,

Petitioner,

v.

BRENTWOOD ACADEMY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF INDEPENDENT SCHOOLS AND TENNESSEE ASSOCIATION OF INDEPENDENT SCHOOLS AS *AMICI CURIAE* SUPPORTING RESPONDENT

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QUESTION PRESENTED

The National Association of Independent Schools and Tennessee Association of Independent Schools will address the following question:

Whether the Sixth Circuit correctly held that the Tennessee Secondary School Athletic Association's enforcement of the Recruiting Rule violated the First Amendment rights of Brentwood Academy.

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IDENTIFICATION AND INTEREST OF *AMICI CURIAE*[1]

Amicus curiae National Association of Independent Schools ("NAIS") is a voluntary membership organization that represents more than 1,300 non-profit, tax-exempt independent elementary and secondary schools throughout the United States and abroad. NAIS member schools are governed by independent boards of trustees, funded through a combination of tuition, endowment and charitable contributions, and their educational quality and integrity are assured through accreditation by recognized state or regional accrediting organizations. NAIS also represents 63 state, regional, or national associations. Most NAIS member schools in the United States participate in athletic associations such as Petitioner, the Tennessee Secondary School Athletic Association ("TSSAA").

The active participation of NAIS schools in interscholastic athletic programs is a key component of the commitment of NAIS member schools to create a complete educational experience for their students. In carrying out this commitment, NAIS' Principles of Good Practice for Athletics are intended to ensure that the proper balance is struck between academic work and athletic activities, and particularly to ensure that athletic programs are carried out with integrity. In furtherance of this intent, NAIS encourages its member schools to work "directly and

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[1] Letters evidencing the consent of the parties to the filing of this brief have been submitted. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party has authored this brief in whole or in part and that no person or entity, other than *amici*, their members or their counsel, has made any monetary contribution to the preparation or submission of this brief.

candidly with other schools to prevent abuses in the following areas: recruitment, eligibility, transfer of student athletes, financial aid, and admission." The purpose behind this principle is to ensure that athletics does not supersede the importance of finding the appropriate school for every student. Further, NAIS recommends that its member schools ensure "that physical education teachers and coaches have appropriate training and knowledge of the school's mission, philosophy, and objectives." This principle is designed to ensure that the school's primary and overarching mission as an educational institution is not lost in the recruitment of athletes and in the athletic training and competition of its students. All NAIS member schools are asked to commit to adherence to all NAIS Principles of Good Practice, in both spirit and practice.

Amicus curiae Tennessee Association of Independent Schools ("TAIS") is the active voice and connective resource for 57 independent schools and more than 3,500 educators in Tennessee. Organized in 1968, TAIS is a service organization and network of independent boarding and day schools in Tennessee. A voluntary membership organization and NAIS member association, TAIS offers a broad variety of services to its member schools. Currently, 34 of the 57 TAIS member schools participate in activities sponsored by TSSAA. For this reason, TAIS and its members are directly impacted by the results of this decision.

TSSAA and the United States are asking this Court to grant governmental entities the same level of control over independent schools as well as any other non-governmental entities voluntarily participating in programs conducted by any state actor that they currently exercise over their own employees and contractors. However, granting that power would result in state actors, for

example, public schools, regulating non-governmental entities with which they also directly compete, for example, all independent schools, including all the NAIS and TAIS member schools, with only limited constitutional protection for the independent schools. NAIS has worked for decades to protect the nation's vital interest in a thriving independent school sector, with a key component of that interest being the ability of independent schools to compete for students fairly with all other schools, public and independent. The interpretation of the First Amendment asserted by TSSAA, if adopted, would severely impair that interest.

In this case, TSSAA openly acknowledges this by arguing that it is trying to "level the playing field" of competition. While this result is troubling where the area of competition is sports, granting state actors the level of control sought here by TSSAA would have a potentially disastrous impact on all programs in which independent schools currently participate and compete with public schools, including school choice initiatives.

One such impact, which goes far beyond the sports-related matter specifically at issue, would be the manner through which these governmental entities would exercise their newly expanded power to regulate independent schools. NAIS and TAIS are extremely concerned that this power would be used to undermine the ability of independent schools to continue to participate in a wide variety of federal and state programs specifically designed to include their equal participation with the public schools. This is particularly true at the state level where some state departments of education are already reluctant to allow independent schools to participate in programming.

Such an outcome would be extremely deleterious to the member schools of NAIS and TAIS because these regulators would have broad discretion, subject at best to only limited oversight, and, if TSSAA has its way, there would be no viable recourse for any independent school adversely affected by decisions of those regulators other than to withdraw from participation in whatever programs were involved. Withdrawal from programs in which independent schools currently participate and compete with public schools, including school choice initiatives, would be very detrimental to the educational mission of all schools, whether public or independent, and to their students.

SUMMARY OF ARGUMENT

The Sixth Circuit correctly applied First Amendment principles to the State of Tennessee, acting through TSSAA as a regulator, not as an employer, contractor, or disburser of funds. The Sixth Circuit also correctly understood that TSSAA's enforcement of the Recruiting Rule restricted the right of an independent school, Brentwood Academy ("Brentwood"), to disseminate information about its extracurricular activities to 12 middle school students who had decided to attend that independent school and indicated their interest to do so by, *inter alia*, signing enrollment contracts.

The voluntariness of Brentwood's participation in TSSAA does not result in a prospective forfeiture of Brentwood's right to challenge the Recruiting Rule on First Amendment grounds. The apt analogy is to cases such as *Board of Regents of the University of Wisconsin*

System v. Southworth, 529 U.S. 217 (2000), where the voluntariness of students agreeing to attend a state university and abide by its rules did not foreclose them from objecting on First Amendment grounds to the manner in which their mandatory student activity fees were being spent by that university.

The letters sent by Brentwood's football coach (the "Spring Practice Letters") notified all 12 of the incoming male middle school students that they could participate in spring football practice and invited them to do so. TSSAA's rules at that time permitted eighth graders to participate in *any* high school's spring football practice. As a result, TSSAA is forced to argue that it was the Spring Practice Letters "alone" that violated the Recruiting Rule. However, the Sixth Circuit understood that the Spring Practice Letters were simply information being provided to incoming students about an extracurricular activity available to them. This type of information is protected by the First Amendment. Moreover, one of the bedrock principles of the First Amendment is the right to receive such information. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969); *Stanley v. Georgia*, 394 U.S. 557 (1969). TSSAA simply ignores this right. Instead, TSSAA claims that this case is about game rules. However, the real competition is between public schools and independent schools for students, and what is paramount is the right of all schools to disseminate information about what they have to offer and the right of parents and prospective students to receive that information.

Because Brentwood was sanctioned for disseminating just that type of information, the Sixth Circuit properly held that the Recruiting Rule was not narrowly tailored. Indeed, the real underlying problem was eighth graders

participating in high school spring football practice, and TSSAA ultimately banned such participation. Accordingly, as applied, the Recruiting Rule did not advance the substantial State interests TSSAA claimed as its goals.

TSSAA also violated the First Amendment because, as applied, the Recruiting Rule favored certain speakers – public schools – and enhanced their power to disseminate information over others – independent schools – in violation of the First Amendment. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

This violation was the result of the "feeder pattern" exception to the Recruiting Rule. The "feeder pattern" consists of the public middle schools whose students will, generally in accordance with a geographic assignment methodology prescribed by the public high school district or other public authority, attend a given public high school upon graduation from the eighth grade, if they attend a public high school. Every public middle school is therefore made part of some public high school's feeder pattern, and every public high school, of course, has public middle schools in its "feeder pattern." However, as an independent school, Brentwood had none: there was no State-determined cohort of middle schools "feeding" their students into Brentwood. In fact, as an independent school, Brentwood could only have had students in its "feeder pattern" if there was a Brentwood Middle School or if Brentwood itself included the eighth grade.

If Brentwood were to have had schools in a prescribed feeder pattern recognized by TSSAA, and if the 12 middle school students who received the Spring Practice Letter had been in Brentwood's feeder pattern, an exception to

what TSSAA defines in the Recruiting Rule as "undue influence" would apply. Hence, there would have been no violation of the Recruiting Rule by Brentwood. However, as an independent school, Brentwood did not and would not have a recognized "feeder pattern."

In addition, if these same 12 middle school students had been in the feeder pattern for Public High School A and the coach of Public High School A had sent a letter inviting them to Public High School A's spring football practice similar to the Spring Practice Letter Brentwood's coach sent, there would have been no violation of the Recruiting Rule by Public High School A.

Therefore, because the Recruiting Rule sanctioned Brentwood for sending letters Public High School A would have been permitted to send under the "feeder pattern" exception, or Brentwood itself could have sent if TSSAA had allowed Brentwood to have a "feeder pattern," the Recruiting Rule was not narrowly tailored. The Recruiting Rule also regulated expression in a manner that did not advance TSSAA's stated goals and burdened more speech than necessary to further the State's substantial interests. The "feeder pattern" exception also demonstrates that the Recruiting Rule as applied was not a valid time, place, or manner restriction.

ARGUMENT

THE RECRUITING RULE, AS APPLIED, VIOLATED BRENTWOOD'S FIRST AMENDMENT RIGHTS.

In deciding Brentwood's First Amendment claim, the Sixth Circuit applied an intermediate level of scrutiny to

the Recruiting Rule, which is a content-neutral regulation by the State of the time, place, and manner of speech. Pet. App. 96a-97a. Intermediate scrutiny is the correct standard because the Recruiting Rule is properly considered State regulation. The Sixth Circuit correctly applied that standard in holding that, as applied to Brentwood, the Recruiting Rule "was not a narrowly tailored way to keep athletics subordinate to academics at Brentwood or ensure that the student athletes being contacted were not being exploited." Pet. App. 102a (footnote omitted).

A. The Recruiting Rule Is A Form Of State Regulation.

This Court has already ruled regarding TSSAA's role as regulator. "The action before us responds to a 1997 regulatory enforcement proceeding brought against" Brentwood. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 293 (2001). This Court also stated that TSSAA "has historically been seen to regulate in lieu of the State Board of Education's exercise of its own authority." 531 U.S. at 291.[2]

Therefore, the Court should reject TSSAA's claim that its regulation of member schools is not that of a State regulating its citizens, just as the Court rejected the similar contention in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963). There, a commission created by state statute argued that "it d[id] not regulate or suppress obscenity but simply exhort[ed] booksellers and advise[d]

[2] One of the purposes of the TSSAA is to "regulate the athletic relations of the secondary schools in Tennessee." TSSAA Constitution, Art. I, Section 2, JA-134.

them of their legal rights." *Id.* at 66. The Court, refusing to elevate form over substance, concluded that the "Commission's operation is a form of effective state regulation superimposed upon the State's criminal regulation of obscenity and making such regulation largely unnecessary." *Id.* at 69.

Contrary to TSSAA's contention, Pet. Br. 31-32, the Sixth Circuit was not confused as to the nature of TSSAA's regulation of its member schools when it held that the "TSSAA, in administering its rules and regulations and imposing penalties against member schools, acts as a regulator, not as an employer, contractor, or disburser of funds." Pet. App. 95a.[3] TSSAA implicitly concedes that point when it strains to distinguish between TSSAA's exercise of "some form of sovereign 'regulatory' authority" over its public school members and its exercise of that same authority over its independent school members on the ground that "the Board of Education itself has no supervisory authority over the rules for private school competition." Pet. Br. at 31. However, this is a distinction without a difference because no Tennessee public school is required to join TSSAA.[4] Therefore, TSSAA's authority

[3] In addition to the fact that the State does not fund any of Brentwood's activities, TSSAA quotes the Sixth Circuit's previous finding that "'TSSAA receives no funding from the state.'" Pet. Br. 4 (quoting *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 180 F.3d 758, 762 (6th Cir. 1999)). Moreover, TSSAA's primary sources of its own funding are gate receipts from tournaments TSSAA sponsors for its member schools and membership dues, Pet. Br. at 4, which this Court described as "income received in their stead. . . ." 531 U.S. at 290-91.

[4] This Court noted that TSSAA includes "most public schools" in Tennessee. 531 U.S. at 290.

over all of its member schools does not depend on whether they are public or independent.

The Court should also reject the claim made by the United States as *amicus* that TSSAA's role as regulator was akin to the way in which the government regulates its employees or contractors. Br. of the United States at 10-12. Indeed, in holding that TSSAA's "regulatory activity may and should be treated as state action," 531 U.S. at 291, this Court stated that only the inclusion of Brentwood and other independent schools making up 16% of TSSAA's membership "prevents the entwinement of [TSSAA] and the public school system from being total and their identities totally indistinguishable." 531 U.S. at 300.

Accordingly, the Sixth Circuit applied the correct legal standard of intermediate scrutiny to the Recruiting Rule for First Amendment purposes.

B. Brentwood Did Not Waive Its Right To Challenge The Recruiting Rule On First Amendment Grounds.

The voluntariness of Brentwood's participation in TSSAA does not result in a prospective forfeiture of Brentwood's right to challenge the Recruiting Rule on First Amendment grounds. TSSAA cannot condition membership on a basis that requires Brentwood or any other member school to give up all of its First Amendment rights. Thus, in *Widmar v. Vincent*, 454 U.S. 263, 268 (1981), the Court noted that a public university's institutional mission to provide education "does not exempt its actions from constitutional scrutiny."

Indeed, the apt analogy is to cases such as *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000). There, the Court addressed the circumstance of a public university which conditioned the opportunity to receive a college education on the payment of a mandatory student activity fee to support extracurricular expression by certain students to which other students objected. The Court held that "[i]f the University conditions the opportunity to receive a college education . . . on an agreement to support objectionable, extracurricular expression by other students, the rights acknowledged in *Abood* [*v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)] and *Keller* [*v. State Bar of Cal.*, 496 U.S. 1 (1990)] become implicated." *Id.* at 231. The Court further held that the "University must provide some protection to its students' First Amendment interests." *Id.* at 233.

There is no principled difference between the voluntariness of Brentwood's decision to join TSSAA and agreeing to abide by its rules and the voluntariness of the objecting students' decision to attend the University of Wisconsin and agreeing to abide by its rules. Neither Brentwood nor those students were thereby foreclosed from objecting to the manner in which those rules violated their First Amendment rights.

The cases TSSAA relies upon in support of its waiver arguments, Pet. Br. at 25-27, miss the mark because they arise in the context of employment contracts between the government and an employee, as in *Snepp v. United States*, 444 U.S. 507 (1980), or in the criminal context where the waiver was neither open-ended nor prospective, such as *United States v. Mezzanatto*, 513 U.S. 196 (1995).

In addition to its efforts to present this case as analogous to an employment context, TSSAA attempts to support the Recruiting Rule as applied to Brentwood by claiming that the First Amendment issues in this case must be viewed through the prism of a case which is "about athletic competition." Pet. Br. at 24. Indeed, TSSAA goes so far as to claim that the Recruiting Rule is no different than a "rule that a coach too vigorously protesting a referee's call will be ejected." Pet. Br. at 1. This case is not about athletic competition or game rules, and TSSAA's assertions trivialize the important First Amendment issues in this case. In urging the Court to use this prism, TSSAA essentially ignores one bedrock principle of the First Amendment: the right to receive information. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) ("It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here."); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas."). The State, acting through TSSAA, cannot, consistent with the First Amendment, restrict the content of information to prospective students regarding some extracurricular activities (those involving interscholastic sports) but not others (those not involving interscholastic sports).

This Court should be wary of any attempt by the State to expand the scope of its regulatory authority over independent schools, particularly under the guise of a case it seeks to portray as simply about athletics and game rules. Public schools and independent schools directly compete with each other in a variety of ways. Their principal competition is for students, and the right of students and their parents to have unfiltered access to information

about school choice so they can make the most informed decision is of paramount importance. It is also worthy of protection under the First Amendment.

Understanding what is really at issue here, the Sixth Circuit correctly found as follows:

> The information about spring football practice was simply information being provided to incoming students about an extracurricular activity available to them – an activity in which incoming students were allowed to participate under TSSAA rules. Incoming students at Brentwood received a variety of information about a multitude of topics and activities, including academics at the school, and the letters and calls should be seen in this context.

Pet. App. 104a (footnotes omitted).

Consistent with its efforts to narrow the implications of this case, TSSAA also asserts that the communications at issue here were not matters of "public concern." That assertion is both incorrect and reflects a fundamental misapprehension of what is at stake here in terms of the First Amendment.[5] Information regarding school choice in general and the extracurricular activities available to prospective students at a given school in particular are matters of public concern. They certainly were a matter of concern to the parents of these 12 middle school students, who "were glad" to have received the Spring Practice Letters. Pet. App. 103a. TSSAA relegates to a footnote its

[5] TSSAA's assertion is also irrelevant because the public concern doctrine in, for example, *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968), only applies in situations where the government is acting as an employer.

assertion that "[t]o the extent Brentwood asserts a more generalized recruiting interest in informing the public of its curricular and extra-curricular offers, such speech of course is not implicated by TSSAA's rule." Pet. Br. 30 n.11. However, such speech is precisely what was sanctioned here. The Recruiting Rule is by no means limited to coaches. By its express terms, it applies to "any person connected, or not connected, with the school. . . ." JA-181.

Moreover, the Spring Practice Letters were at least as much a matter of public concern as what was at issue in *McGreevy v. Stroup*, 413 F.3d 359, 365 (3d Cir. 2005) (school nurse's advocacy on behalf of two disabled students was a matter of public concern), and *Richards v. Sandusky Community Schools*, 102 F. Supp. 2d 753, 758 (E.D. Mich. 2000) (school bus driver's reports regarding one child spitting on school bus "constituted a matter of concern to the community, or at the very least, to the other children on the bus and their parents").

TSSAA's contention that Brentwood's communications cannot be considered a matter of public concern because they were motivated by self-interest is also not correct. The fundamental distinction recognized in *Connick v. Myers*, 461 U.S. 138 (1983), is between matters of public concern and matters of only personal interest. Thus, the proper focus is on what a speaker intends to communicate rather than the speaker's intent in making that communication. In *Connick,* a public employee disseminated a questionnaire "to gather ammunition for another round of controversy with her superiors" because of her "dissatisfaction with a transfer." *Id.* at 148. Although this personal grievance was the impetus for the questionnaire, this Court concluded that "[o]ne question in [the] questionnaire . . . does touch upon a matter of public concern." *Id.* at 149.

In *Rankin v. McPherson*, 483 U.S. 378, 380 (1987), a county employee was fired after telling a co-worker in what he thought was a private conversation occurring after hearing a news report of an attempt to assassinate the President, that "'[i]f they go for him again, I hope they get him.'" This Court held that "[c]onsidering the statement in context, as *Connick* requires, discloses that it plainly dealt with a matter of public concern." *Id.* at 386.

The Sixth Circuit understood the importance of the First Amendment rights at issue in this case and correctly concluded that Brentwood did not waive its right to challenge the Recruiting Rule as applied to it on First Amendment grounds by joining TSSAA and agreeing to abide by its rules.

C. The Recruiting Rule Was Not Narrowly Tailored.

The Recruiting Rule was not narrowly tailored. The real underlying problem was not information about the availability of spring football practice because when the Spring Practice Letters were sent, eighth graders were permitted under TSSAA's rules to attend *any* high school's spring football practice. The real underlying problem was eighth graders participating in high school spring football practice. TSSAA ultimately banned such participation. Pet. App. 104a. Thus, as applied to Brentwood, the Recruiting Rule did not advance the substantial State interests TSSAA claimed as its goals. In addition, TSSAA sanctioned an independent school for disseminating information about one of its extracurricular activities to 12 middle school students, all of whom "had applied, been tested and admitted, and signed enrollment contracts with

Brentwood," Pet. App. 83a (footnote omitted), before they received the Spring Practice Letters.

Regardless of the actual reasons TSSAA decided to apply the Recruiting Rule to Brentwood's Spring Practice Letters, the text of the Recruiting Rule and its interpretive commentary, JA-181-JA-185, demonstrate that the Recruiting Rule was not narrowly tailored. The Sixth Circuit correctly concluded that the Recruiting Rule does not withstand intermediate scrutiny for this reason. Pet. App. 106a-107a. The Sixth Circuit also was correct that the Recruiting Rule, as applied, violated Brentwood's First Amendment rights.

The full text of the Recruiting Rule is:

> Section 21. The use of undue influence on a student (with or without an athletic record), the parents or guardians of a student by any person connected, or not connected, with the school to secure or to retain a student for athletic purposes shall be a violation of the recruiting rule.

JA-181.

One of the things the commentary to the Recruiting Rule in effect defines as "undue influence" is:

> Any initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/athlete enrolled in any member school **except where there is a definite feeder pattern.**

JA-182 (emphasis added).

The "feeder pattern" consists of the public middle schools whose students will, generally in accordance with a geographic assignment methodology prescribed by the

public high school district or other public authority, attend a given public high school upon graduation from the eighth grade, if they attend a public high school. Every public middle school is therefore made part of some public high school's feeder pattern, and every public high school, of course, has public middle schools in its "feeder pattern." However, as an independent school, Brentwood had none: there was no State-determined cohort of middle schools "feeding" their students into Brentwood. In fact, as an independent school, Brentwood could only have had students in its "feeder pattern" if there was a Brentwood Middle School or if Brentwood itself included the eighth grade. Thus, the "parties have stipulated that [Brentwood] has no schools in its feeder pattern." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 13 F. Supp. 2d 670, 687 (M.D. Tenn. 1998).

This is a critical fact for several reasons. First, if TSSAA had allowed Brentwood to have middle schools in its feeder pattern as every public high school did, and if the 12 middle school students who received the Spring Practice Letter had been in Brentwood's feeder pattern, an exception to what TSSAA defines as "undue influence" would apply. Hence, there would have been no violation of the Recruiting Rule by Brentwood.

Second, if these same 12 middle school students had been in the feeder pattern for Public High School A and the coach of Public High School A had sent a letter inviting them to Public High School A's spring football practice similar to the Spring Practice Letter Brentwood's coach sent, an exception to what TSSAA defines as "undue influence" would apply. Hence, there would have been no violation of the Recruiting Rule by Public High School A.

Third, notwithstanding the foregoing and substituting hyperbole for fact and common sense, TSSAA contends that "Brentwood's violations were unambiguous and clearly harmed the interests the recruiting rule is designed to serve." Pet. Br. at 33. However, as its support, TSSAA can only speculate that "[t]he practice invitation alone" resulted in 12 middle school students leaving their own school's extracurricular activities and "*perhaps* [gave] Brentwood an opportunity to evaluate their skills before making final decisions on financial aid packages." Pet. Br. at 33 (emphasis added).[6]

Fourth, it must be kept in mind that the substantial governmental interests TSSAA contends were served by the Recruiting Rule were subordinating athletics to academics, protecting students from exploitation, and competitive equity (the so-called "level playing field"). Pet. App. 97a. However, if Public High School A's invitation to spring football practice would not have violated the Recruiting Rule when sent to middle school students in its feeder pattern, TSSAA's claims, echoed by numerous *amici*, about the harms from the "practice invitation alone," and in particular "competitive equity" and "level playing field," are revealed as simply makeweight.

As a result of the "feeder pattern" exception to when there is a violation of the Recruiting Rule,[7] TSSAA is forced to argue that the Recruiting Rule is entitled to be

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[6] It is troubling that after the extensive discovery in this case and a full trial, TSSAA elects to make arguments in this Court lacking any basis in the record whatsoever.

[7] The trial court found as a fact "that the 'feeder pattern' exceptions have long existed and have been applied by the TSSAA and relied upon by member schools." Pet. App. 51a.

enforced against Brentwood even if Brentwood's violation – the "practice invitation alone" – had nothing to do with the State's interests for promulgating the Recruiting Rule. Pet. Br. at 37-38. However, TSSAA misreads the teaching of *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). There, the Court reaffirmed "that a regulation of the time, place or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so." *Id.* at 798. In so holding, the Court explained that "this standard does not mean that a time, place, or manner regulation may burden substantially more speech than is necessary to further the government's legitimate interest. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Id.* at 799 (footnote and citation omitted).

When tested against *Ward*, the Recruiting Rule gets a failing grade. The Recruiting Rule prohibits the "use of undue influence" on a student or his or her parent "to secure or to retain a student for athletic purposes. . . ." However, the Recruiting Rule cannot be sustained when, as applied to Brentwood, "the practice invitation alone," Pet. Br. at 33, constituted "undue influence" on the 12 middle school students who received them but similar letters sent to those same students would have been permissible if sent to those same 12 students by the public high school coaches in their respective feeder patterns. Moreover, the "feeder pattern" exception to the Recruiting Rule would have permitted those public high school coaches to have sent such letters to these 12 students even though the parents of all 12 had already returned signed

enrollment contracts to Brentwood stating the intention of those students to attend Brentwood. Pet. App. 83a.

Whatever goals TSSAA had in mind when it promulgated the Recruiting Rule insofar as spring football practice was concerned were achieved without impacting anyone's First Amendment rights by banning all middle school students from participating, which TSSAA subsequently did. Pet. App. 104a. Moreover, that subsequent prohibition underscores the conclusion that the Recruiting Rule was not narrowly tailored as applied to Brentwood. In *City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 810 (1984), the Court contrasted the ban on billboards on public property, which it approved, with the ban on the distribution of leaflets under an anti-littering statute, which it had struck down in *Schneider v. State of New Jersey, Town of Irvington*, 308 U.S. 147, 162-63 (1939), because the anti-littering statute banned all leafletting rather than punishing litterers. The Court held that "[i]n contrast to *Schneider*, therefore, the application of the ordinance in this case responds precisely to the substantive problem which legitimately concerns the City. The ordinance curtails no more speech than is necessary to accomplish its purpose." 466 U.S. at 810.

In dissent, Judge Rogers concluded that "the anti-recruiting rule as applied to Brentwood is narrowly tailored and leaves Brentwood alternative channels to communicate its message" such as having "been distributed to representatives of private sports leagues near Brentwood, school administrators of other schools with a request for distribution, or students who on their own had contacted appropriate Brentwood officials." Pet. App. 145a (Rogers, J., dissenting). However, as this Court has noted, "[w]e are aware of no general principle that freedom of

speech may be abridged when the speaker's listeners could come by his message by some other means, such as seeking him out and asking him what it is. Nor have we recognized any such limitation on the independent right of the listener to receive the information sought to be communicated." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 n.15 (1976).

Under these circumstances, the Recruiting Rule also violates the rule that "[i]n the realm of private speech or expression, government regulation may not favor one speaker over another." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995) (citation omitted). In *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 790-91 (1978), the Court stated that "[w]e noted only recently that 'the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . .'" (quoting *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976)). When, as here, the Recruiting Rule has precisely that effect by favoring public schools when there is a "feeder pattern" over independent schools with no "feeder pattern," the First Amendment is violated.

Furthermore, that TSSAA's asserted interests may be substantial does not automatically sustain the Recruiting Rule. To the contrary, in *First Nat'l Bank*, the Court struck down on First Amendment grounds a state statute that prohibited corporations from spending money to influence the vote on referendum proposals. There, Massachusetts argued that corporate "participation would exert an undue influence on the outcome of a referendum vote. . . ." 435 U.S. at 789. The Court declined to consider that claim without support in the record or in legislative findings. *Id.*

Here, the trial court found that TSSAA has not done any studies on the harm of recruiting. Pet. App. 45a.

In *Edenfield v. Fane*, 507 U.S. 761, 770 (1993), the Court held that "[t]he penultimate prong of the *Central Hudson* test requires that the regulation impinging upon commercial expression 'directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose.'" (quoting *Central Hudson Gas & Electric Corp. v. Public Service Commission of N.Y.*, 447 U.S. 557, 564 (1980)). The Court in *Edenfield* went on to hold that the party seeking to uphold a restriction on commercial speech carries the burden of justifying it, which "burden is not satisfied by mere speculation or conjecture," but rather requires the governmental body to "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id.* at 770-71 (citations omitted). The Sixth Circuit held that TSSAA failed to carry its burden. Pet. App. 106a-107a.

Moreover, although content-neutral, the Recruiting Rule "still must serve a substantial state interest in a direct and effective way. . . . Where a restriction on speech lacks this close and substantial relation to the governmental interests asserted, it cannot be, by definition, a reasonable time, place or manner restriction." *Edenfield*, 507 U.S. at 773 (internal quotations and citations omitted). As applied to Brentwood or any other independent school seeking to disseminate information about the extracurricular activities it has to offer – the activities which it is undisputed that these 12 students had a right to know about and participate in – the Recruiting Rule violates the First Amendment. A contrary holding would, at a minimum, give the public school sector greatly expanded

regulatory authority over the ability of independent schools to disseminate information to parents, prospective students and the public at large about what they have to offer as alternatives to public schools. Such a result would be disastrous for independent schools, students, parents and the First Amendment.

CONCLUSION

For the foregoing reasons, the National Association of Independent Schools and the Tennessee Association of Independent Schools urge this Court to affirm the judgment of the Sixth Circuit on the First Amendment issue.

Respectfully submitted,

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March 27, 2007

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No. 06-427

In The
Supreme Court of the United States

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION,

Petitioner,

v.

BRENTWOOD ACADEMY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Amicus will address the following questions, as framed by the parties' reasons for granting a writ of certiorari and now presented on merits review:

I. Whether this Court should reconsider and overturn its holding in *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001), which constituted a break with existing precedent and created an ad hoc approach to "state action" determinations that is incapable of principled application.

II. Whether the Sixth Circuit erred in determining the relative substantial importance of "competitive equity" in scholastic and amateur sports.

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INTEREST OF *AMICUS CURIAE*[1]

The National Collegiate Athletic Association ("NCAA") is a voluntary association composed of colleges, universities and athletic conferences throughout the United States. Its purpose is, and always has been, to promote amateur athletics in conjunction with higher education. Membership in the NCAA is purely voluntary and it is funded exclusively by membership dues and income generated in connection with NCAA events and championships. The NCAA does not receive any federal or state governmental funding or subsidy.

Much like the members of Petitioner in the present case, NCAA member institutions have developed a set of rules by which all members agree to abide. These rules are designed to ensure that: (1) athletics are subordinate to academics; (2) student athletes are not subject to exploitation; and (3) there is and remains competitive equity among member institutions in NCAA sanctioned sporting events. Member institutions also developed an effective manner of policing themselves and determining uniform and appropriate corrective action when a member seeks to gain an unfair advantage or otherwise fails to follow the rules adopted by the membership.

Because of the voluntary nature of membership in the NCAA, its inclusion of both public and private member institutions, and the absence of any individual state

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[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court of the United States, *Amicus* states that no counsel for any party to this cause authored this brief in whole or in part, and no person or entity other than *Amicus* made any monetary contribution to the preparation or submission of this brief. In addition, *Amicus* has sought and received consent from counsel for Respondent to submit this brief.

delegation of authority or regulatory power, this Court has previously recognized that the NCAA is not a "state actor." *NCAA v. Tarkanian*, 488 U.S. 179, 193 (1988). The NCAA has relied on *Tarkanian* in pursuing its mission as well as in resolving disputes with member institutions, their agents and employees. But this Court's decision in *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001), and the decision below in this case, make it clear that the "entwinement" standard for determining when a private entity can be a state actor has only confused, if not implicitly supplanted, this Court's long-standing precedent and has proven incapable of principled application. For this reason, *Amicus* joins Petitioner in requesting that this Court reconsider and overturn its decision in *Brentwood*.

SUMMARY OF ARGUMENT

1. *The "entwinement" test that has emerged from this litigation is predicated on facts that would not give rise to a finding of state action under this Court's long-standing jurisprudence and, therefore, is an abrupt and unwarranted departure from that precedent.* This Court's initial determination that the Tennessee State Secondary Athletic Association ("TSSAA") is a "state actor" was not founded on any traditional notion of state action as previously understood by this and other courts. Indeed, following established precedent, the Sixth Circuit first found that the TSSAA was not a state actor because, among other things, it is a private, non-profit and voluntary association of both public and private schools that does not receive any state funding. This Court reversed, creating a new "entwinement" standard and holding that the TSSAA

was so "entwined" with the State of Tennessee that it had become a state actor. This Court based its finding primarily on a non-binding, ineffectual rule of the Tennessee State Board of Education that had merely recognized the TSSAA's historical and beneficial role in the promotion and oversight of interscholastic athletics. Because that rule had no practical effect on the actions of either the TSSAA or the State, because the State had no authority to delegate any power to the TSSAA concerning athletics, and because the so-called rule was repealed prior to the conduct complained of by Brentwood Academy in this litigation, the actions of the Board of Education could never have amounted to state action under any previously recognized standard. Likewise, the Court's attribution of state action to the TSSAA's collection of gate receipts as public "funding" finds no basis in existing law. Only through fashioning the brand-new, undefined (and therefore expansive) notion of entwinement could the TSSAA be transformed from a voluntary private association into a state actor.

2. *Lower court confusion over the meaning and application of the "entwinement" test has proven it incapable of principled application, subverting the purpose of limits on state action and leading to present and future protracted litigation.* The term "entwinement" was never defined by the Court to guide lower courts, nor does it appear in this Court's prior state action jurisprudence. As such, "entwinement" represents a new, greatly expansive test, which leaves voluntary associations such as Petitioner, *Amicus* and others lost in a sea of doctrinal uncertainty. Both courts and commentators have expressed concern that the notion of "entwinement" will be an exception to the traditional restraints of the state action

doctrine that will effectively swallow the whole. Already, the United States Court of Appeals for the Second Circuit has seemingly applied the ill-defined bounds of "entwinement" to encompass *Amicus*, in direct conflict with an express ruling to the contrary by this Court. It is becoming increasingly clear that the "entwinement" test leaves private individuals and organizations such as Petitioner and many others unable to know whether they will be held state or private actors until after discovery and motion practice, or – as in the case at bar – even after appellate review. Any such standard is inherently unworkable and only prone to spawn far more litigation than it might hope to avoid.

3. *Following remand from this Court, the Sixth Circuit's attempt to apply First Amendment and Due Process principles to the activities of the TSSAA further demonstrates that the TSSAA is not a state actor.* Following this Court's finding that the TSSAA is as a state actor, upon remand, the Sixth Circuit had virtually no guidance as to how to glean and apply the constitutional implications that follow from this conclusion. The Sixth Circuit's awkward imposition of intermediate First Amendment scrutiny and Due Process analysis upon such matters as alleged high school recruiting violations only demonstrates the practical and theoretical fallacies inherent in treating the TSSAA, and similar associations, as state actors.

There exists no meaningful precedent for distinguishing alleged violations for pre-matriculation contact with student athletes (as alleged here) from coaches complaining to officials about "bad calls," shouting epithets, or other conduct that may violate an association's rules. The folly of the Sixth Circuit's First Amendment analysis is perhaps best demonstrated by its attempt to prioritize and

define what athletic purposes serve a "substantial state interest." In this regard, the Sixth Circuit's failure to recognize the importance of competitive equity in sports, as well as in any competitive activity – even those in which there is a state interest – well illustrates that organizations such as the TSSAA are best suited to self-determine their own means and ends, not state legislatures, courts or the Constitution. In other words, this case provides an example of what happens when state action is defined too broadly. Where, as here, there can never be a controlling state interest precisely because the action at issue is not state action – even though the interest itself may be very substantial to those parties legitimately concerned.

ARGUMENT

This case presents a question of enduring national importance; that is, should the criteria for actions deemed "fairly attributable to the State," *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982), be expanded beyond their reasonable and traditional limits, so that any private person or entity alleged to be somehow "entwined" with the State inevitably becomes a "state actor"? This Court's opinion in *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001) ("*Brentwood I*"), effectively answered this question in the affirmative. In so doing, the Court ignored established standards for determining state action, creating instead a brand-new, undefined and expansive doctrine of "entwinement." Confusion over the meaning and application of *Brentwood I* has caused the Sixth Circuit (and other courts) to stretch the

concept of state action far beyond its traditional and well-established meaning.

The facts and procedural history below have been extensively briefed by the parties and need not be repeated by *Amicus*. However, a few essential points bear emphasis. The Tennessee Secondary School Athletic Association ("TSSAA") is a private, non-profit membership corporation organized to promote and regulate sport among public and private high schools that volunteer to become members. 531 U.S. at 291. The association is supported solely by membership dues and gate receipts and receives no state funding or other subsidy. *Id.* The TSSAA's governing structure consists of secondary school principals, assistant principals and superintendents from member schools, both public and private, none of whom are paid by the State in this capacity. *Id.*[2] The State charges a fee to the TSSAA for its use of any state-owned facilities, and does not exempt it from state taxation. *Id.* Finally, no Tennessee law purports to authorize the State to oversee or regulate interscholastic athletics, nor does the State delegate such authority to the TSSAA. *Id.* Prior to *Brentwood I*, upon first considering this case, the Sixth Circuit had little trouble concluding that "[t]hese facts make clear that the TSSAA is not an arm of the government." *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 180 F.3d 758, 762 (6th Cir. 1999). Turning to well-established "contours of the state action doctrine," under *Blum v. Yaretsky*, 457

[2] As noted by the dissent in *Brentwood I*, while at the time in question the TSSAA's Board of Control consisted of employees of public schools, there is nothing that prevents private school officials from election to the Board and, in any event, Board members are charged with acting on behalf of all member schools rather than their individual institution. *Id.* at 307 (Thomas, J., dissenting).

U.S. 991 (1982), *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), and *Rendell-Baker v. Kohn*, 457 U.S. 839 (1982), the Sixth Circuit found that the TSSAA could not be regarded as a state actor under the three existing standards articulated by this Court. 180 F.3d at 763. First, finding that regulation of interscholastic sport is not a power traditionally within the province of the state (and acknowledging the unanimity of courts on this point), the Court of Appeals correctly found that the TSSAA did not meet the "public function test" necessary to find state action. *Id.* Second, the court found no indicia of "state compulsion," holding that the record was absent of any evidence that the State so "coerced or encouraged" the TSSAA that its decisions "must be regarded as the choice of the state." *Id.*

In rejecting the "compulsion" rationale, the Circuit Court found irrelevant the fact that the Board of Education had once promulgated a subsequently repealed resolution "designating" the TSSAA to conduct interscholastic activities. *Id.* at 764. Aside from the fact that the State has never itself played such a role, the Sixth Circuit found that such a meaningless proclamation was alone insufficient to tie the actions of the TSSAA inextricably to the State. *Id.* (citing *Jackson v. Metropolitan Edison*, 419 U.S. 345 (1974)). (This issue finds its significance from the fact that the majority in *Brentwood I* relied heavily on what is tantamount to the Board's "non-binding resolution" in finding "entwinement" between the TSSAA and the State of Tennessee. 531 U.S. at 300-01.) Third, and finally, the Sixth Circuit also rejected the argument that TSSAA may be regarded as a state actor under the "symbiotic relationship" test for essentially the same reason – the absence of any evidence of "significant encouragement,

either overt or covert, that the choice must in law be deemed to be that of the State." 180 F 3d at 764.

Applying decades-old precedent of this Court and its state action doctrine, the Sixth Circuit reached the inevitable conclusion that, under the facts at bar, the TSSAA could not be fairly regarded as a state actor under any established framework. *Id.* at 766. This holding was perfectly consistent with this Court's state action jurisprudence, which cautions against attaching the State's "badge of authority" to private actors, because the state action requirement "preserves an area of individual freedom by limiting the reach of federal law." *Lugar*, 457 U.S. at 936. The holding also provided other private associations that govern voluntary athletic (and similar) activities, such as the NCAA, with continuity in the law, reaffirming this Court's ruling in *NCAA v. Tarkanian*, 488 U.S. 179 (1988).

Eschewing its own well-established precedent, by a 5-4 vote, this Court reversed the Sixth Circuit in *Brentwood I*, finding, for the first time, that an undefined showing of "entwinement" was sufficient to establish state action. 531 U.S. at 296-97. As noted by the dissent, the term "entwinement" appears nowhere in this Court's previous state action jurisprudence. *Id.* at 312-13. (Thomas, J., dissenting). Although acknowledging its 1982 line of cases, *id.* at 298, the majority opinion opts not to apply the standards announced in those cases, but instead relies on two tenuous threads between the TSSAA and the State to find entwinement.

First, the majority created an artificial nexus between the TSSAA and the State by citing the 1972 proclamation by the Tennessee Board of Education recognizing the

TSSAA's historical role in overseeing high school athletics. *Id.* at 293-94. Apart from the fact this "rule" was repealed in 1996, one year before the dispute at hand, *id.*, the majority mistakenly characterizes the Board's action as a "delegation" to regulate athletics "in lieu" of "its own authority." *Id.* at 291. In fact, no Tennessee law ever granted the Board any such authority and nothing in the record suggests that this rule was anything more than the equivalent of a non-binding resolution or legislative proclamation. As further noted by the dissent, "[t]here is no indication that the TSSAA invited this resolution or that the resolution in any way altered the actions of the TSSAA or the State following its adoption in 1972." *Id.* at 308 n.2 (Thomas, J., dissenting). In this regard, the resolution was nothing like the kind of close state-nexus connection required by *Blum, Lugar* and *Rendell-Baker.*

The only other arguably relevant State-Association tie evident in the majority opinion is the purported financial relationship created between the TSSAA and Tennessee. *Id.* at 299. The Court concluded that "public schools have largely provided for the Association's financial support," *id.*, based upon the supposition that "[t]he Association thus exercises the authority of the predominantly public schools to charge for admission to their games; the Association does not receive this money from the schools, but enjoys the schools' moneymaking capacity as its own." *Id.* This Court has never before found state action based upon a similar, "indirect financial benefit" basis. To the contrary, it has expressly rejected it. *See NCAA v. Smith*, 525 U.S. 459, 468 (1999) (NCAA not a state actor as the result of receiving dues from members who receive federal financial assistance); *see also Rendell-Baker*, 457 U.S. at 843 (such a "fiscal relationship with the State is not different than

that of many contractors performing services for the government."). In the words of the *Brentwood I* dissent: "The TSSAA provides a service – the organization of athletic tournaments – in exchange for membership dues and gate fees, just as a vendor could contract with public schools to sell refreshments at school events. Certainly the public school could sell its own refreshments, yet the existence of that option does not transform the service performed by the contractor into state action." 531 U.S. at 311 (Thomas, J., dissenting).

In light of the questionable state action factors identified by the majority, and because of the absence of any meaningful definition of what else might constitute entwinement, *Brentwood I* remains an inscrutable and ultimately unworkable precedent. Further, it disregards (and perhaps eviscerates) the fundamental holding of *Tarkanian* and leaves associations such as the TSSAA, the NCAA and any similarly situated entity foundering in uncertainty.

Every bit as disturbing, this Court's holding in *Brentwood I* has implications reaching far beyond the First Amendment and Due Process concerns at issue in the present case. If allowed to stand, it would impose an unknown panoply of constitutional obligations on heretofore private actors under the Fourth, Fifth, Sixth and Fourteenth Amendments. Accordingly, in addition to the recent, direct evidence that *Brentwood I* is incapable of principled application, this Court should also consider the vast uncertainty that future courts and litigants face in confronting a regime in which an entity may well be unaware it qualifies as a state actor until litigation, following discovery or, ultimately, following motion practice or even appellate resolution.

I. *Brentwood I* Represented an Abrupt and Unwarranted Departure from this Court's State Action Jurisprudence

The imposition of constitutional obligations on private individuals and entities has been, at best, historically problematic. The early, extremely narrow view of what could amount to state action, *see United States v. Cruikshank*, 92 U.S. 542 (1876); *Civil Rights Cases*, 109 U.S. 3 (1883),[3] eventually gave way to a broader approach, in which courts looked toward whether private action in reality was performing a "public function." *See, e.g., Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974) (holding that a "company town," having been allowed by the state to perform all of the functions and activities normally within the province of a city, must adhere to the First and Fourteenth Amendments). At the same time, in making this determination, this Court has rejected the sort of "balancing" test that would leave potential state actors no understandable basis for being classified as such. *See, e.g., Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978).

A clear standard, capable of consistent and fair application, eventually emerged from three benchmark cases, all decided in 1982. First, in *Blum*, 457 U.S. 991, this Court rejected the notion that individuals may be subject to constitutional restraints merely because some of their activities or policies are regulated by the government.

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[3] Of course, in their historical context of the Reconstruction era, these cases presented extreme examples of the failure to find state action in the face of blatant assaults on the rights of freed slaves by private actors who were – at a minimum – acting with the tacit approval or even open encouragement of the State.

In *Blum*, this Court found that state penalties imposed on nursing homes as the result of decisions made by such facilities and their physicians did not transform either into state actors, as they were not performing any "public function." *Id.* at 1004. *Blum* established an unequivocal guiding principle that, in every case, courts must determine whether an action "can fairly be attributed to the State." *Id.*; *see also Jackson*, 419 U.S. at 352.

The admonition to restrain from too readily clothing a private actor under the shroud of state action is equally evident in *Lugar*, 457 U.S. 922. While the narrow question in *Lugar* concerned the involvement of state officials in the prejudgment attachment process instituted by private creditors, its wider holding created a second standard for determining state action as recognized here by the Sixth Circuit in its first panel opinion; that is, whether an entity may be deemed a state actor because it has received "significant aid," encouragement or enabling by state officials so as to be acting under color of state law. *Id.* at 936. The *Lugar* test does not examine whether a private individual "performs a traditional function reserved to the states," but instead asks whether his conduct is *significantly* promoted in some way that would otherwise not be possible without assistance of the State. As the Sixth Circuit originally found, in this case, the ceremonial nod of approval once given by the State Board of Education to the TSSAA regarding *its* oversight with respect to secondary school athletics comes nowhere near meeting this well-established standard. 180 F.3d at 763.

Finally, this Court previously recognized a third framework for defining who is a state actor in *Rendell-Baker*, 457 U.S. 839. Often referred to as the "symbiotic relationship" test, this approach begins with the central

question posed by *Blum*: whether the alleged infringement on federal rights is fairly attributable to the state? *Id.* at 839-43. This, always, is the ultimate inquiry. The nuance presented by the "symbiotic relationship" notion is simply whether there is a nexus of mutuality such that the private actor can fairly be said to act as a proxy for the State. *Id.* Neither extensive state regulation, *e.g.*, *Blum*, 457 U.S. at 1004, nor state funding is alone sufficient to support a finding of a symbiotic relationship. *Id.; Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972); *Crowder v. Conlan*, 740 F.2d 447, 450-51 (6th Cir. 1984). In the present case, it is undisputed that the TSSAA was not subject to State regulation *of any nature*, nor was it the recipient of one penny of State funding. Under any application of this standard, the TSSAA cannot be fairly said to qualify as a "state actor."

These three frameworks all operate to reach the same basic determination whether it is the State, not the individual, that is actually behind the challenged conduct. More importantly, they were crafted to ensure this finding is made with the utmost care, to limit the reach of federal law upon private actors and to "avoid the imposition of responsibility on a State for conduct it could not control." *Tarkanian*, 488 U.S. at 191. Once again, it is undeniable that the State of Tennessee did not and could not coerce (or, conversely, prohibit) the TSSAA from promulgating or enforcing its own rules among its voluntary membership.

Because the TSSAA does not satisfy any of these three well-established tests, by this Court's pre-existing precedent, its conduct could not "be fairly attributable to the State." *Blum*, 457 U.S. at 1004. In finding otherwise, the majority in *Brentwood I* crafted an entirely new test: whether the conduct of the individual and the State are

sufficiently "entwined" to constitute state action. 531 U.S. at 288-89. The majority did not actually define what might constitute "entwinement," nor did it purport to tie that concept to any of the three traditional frameworks. *See Id.* at 312 (Thomas, J. dissenting). As such, entwinement created a new doctrine of state action, without the prophylactic constraints developed under prior law designed to limit state-action status solely to those private actors whose conduct can be "fairly attributed" to the State.

II. The *Brentwood I* State Action Framework is Not Capable of Principled Application

The undefined, amorphous entwinement test announced in *Brentwood I* has resulted in pronounced confusion among the lower courts and robust criticism by commentators. Lower courts have variously described the entwinement doctrine as "labyrinthine," "nebulous," "vague," and a "freewheeling *gestalt* analysis."[4] Lower courts have become confused even about how many different state action tests there actually are. *See Wang v. Blue Cross Blue Shield Ass'n,* 55 F. App'x 802, 803 (9th Cir. 2003) ("seven approaches to the issue"); *Keeling v. Schaefer,* 181 F. Supp. 2d 1206 (D. Kan. 2001) (four tests);

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[4] *See* Petition for Writ of Certiorari, at 28 (citing *Leshko v. Servis,* 423 F.3d 337, 338 (3d Cir. 2005) ("labyrinthine"); *Kirtley v. Rainey,* 326 F.3d 1088, 1094-95 (9th Cir. 2003) ("vague"); *Tancredi v. Metro. Life Ins. Co.,* 378 F.3d 220, 230 (2d Cir. 2004) ("nebulous"); *Crissman v. Dover Downs Entmt.*, 289 F.3d 231, 233 (3d Cir. 2002) ("little is straightforward"); *Willis v. Town of Marshall,* 293 F. Supp. 2d 608, 615 (W.D.N.C. 2003) ("anything but clear and consistent"), *rev'd in part on other grounds,* 426 F.3d 251 (4th Cir. 2005); *Gross v. Fond Du Lac County Agric. Soc'y, Inc.,* 2005 U.S. Dist. LEXIS 19537, at *23 (E.D. Wis. Sept. 6, 2005) ("freewheeling *gestalt* analysis")).

Sabeta v. Baptist Hosp. of Miami, Inc., 410 F. Supp. 2d 1224 (S.D. Fla. 2005) (three tests). This reaction should not be surprising; it was bluntly predicted by the dissent:

> Because the majority never defines "entwinement," the scope of its holding is unclear. If we are fortunate, the majority's fact-specific analysis will have little bearing beyond this case. But if the majority's new entwinement test develops in future years, it could affect many organizations that foster activities, enforce rules, and sponsor extracurricular competition among high schools – not just in athletics, but in such diverse areas as agriculture, mathematics, music, marching bands, forensics, and cheerleading. Indeed, this entwinement test may extend to other organizations that are composed of or controlled by, public officials or public entities, such as firefighters, policemen, teachers, cities, or counties.

Id. 314-15 (Thomas, J., dissenting).[5] Without question, as the dissent notes, the new doctrine of "entwinement" extends far beyond the facts of this case and could be used to make "public" many institutions and activities long regarded as private. *See, e.g., D'Alessio v. Securities and Exchange Commission*, 380 F.3d 112 (2d Cir. 2004) (noting that the New York Stock Exchange has never been held to

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[5] Scholarly concern over the imminent expansion of *Brentwood I* beyond the facts of this case has already begun. *See* Donna M. Nagy, *Playing Peekaboo With Constitutional Law: the PCAOB And Its Public/Private Status*, 80 Notre Dame L. Rev. 975 (2005) (questioning the propriety and workability of applying *Brentwood* to the newly created Public Company Accounting Oversight Board); Lisa J. Chadderdon, *No Political Speech Allowed: Common Interest Developments, Homeowners Associations, and Restrictions on Free Speech*, 21 J. Land Use and Envtl. Law 233, 242 (2006) (noting that, following *Brentwood*, "there is no single, clear state action doctrine.").

be a state actor); *Desiderio v. NASD*, 191 F.3d 198, 206-07 (2d Cir. 1999) (National Association of Securities Dealers ("NASD") not a state actor); *see generally United States v. Int'l Bhd. of Teamsters*, 941 F.2d 1292, 1295 (2d Cir. 1991), *cert. denied*, 502 U.S. 1091 (1992). In each of these cases, *Brentwood* might easily be read to transform these private associations with voluntary members into state actors merely by virtue of some amorphous "entwinement" with the state. For example, the oversight role the NASD has played with its members is at least as comprehensive as the role played by the TSSAA. Certainly, that role has at least been "acknowledged" or recognized by the SEC, *see ibid.*, inasmuch as the Tennessee Board of Education has acted similarly, yet NASD has never been held to be a state actor – yet.

Commentators likewise have been harshly critical of the new "entwinement" framework. *See* Kevin P. Braig, *A Game Plan to Conserve the Interscholastic Athletic Environment After LeBron James*, 14 Marq. Sports L. Rev. 343, 382 (2004) ("the reasoning in *Brentwood Academy* that a state high school athletic association such as the OHSAA is a 'state actor' is based on an intuitive, ad hoc doctrine grounded on a 'vague notion of entwinement. The Court's decision *is conspicuously not based on prior conceptions of the state action doctrine. . . .*'") (emphasis added); *see also* John Fee, *The Formal State Action Doctrine and Free Speech Analysis,* 83 N.C.L. REV. 569, 587 (2005) (characterizing "entwinement" as "so malleable that no outcome is excluded . . . artificial and incapable of principled application"); Alan R. Madry, *Statewide School Athletic Associations and Constitutional Liability: Brentwood Academy v. Tennessee Secondary School Athletic Association*, 12 MARQ. SPORTS L. REV. 365 (2001) ("incoherent," "ad hoc," and

"rides against a strong contrary tide"); Michael L. Wells, *Identifying State Actors in Constitutional Litigation: Reviving the Role of Substantive Context,* 26 CARDOZO L. REV. 99, 125 (2004) ("the Court appears to have gone astray").

A most recent, and extremely troubling, attempt to apply *Brentwood* can be found in the Second Circuit Court of Appeal's decision in *Cohane v. The National Collegiate Athletic Association*, No. 05-5860, 2007 WL 247710 (2d Cir. Jan. 25, 2007) ("*Cohane*"). With a mere one-line, out-of-context quote citing *Brentwood I*, the Second Circuit appears to read that case to *sub silentio* overturn – or at least unrecognizably alter – this Court's longstanding precedent in *Tarkanian*. Slip. Op. p. 4. In *Cohane*, the District Court had dismissed plaintiff's claim that the NCAA is a state actor in accord with the clearly announced criteria of *Tarkanian*[6]; that is, that the NCAA is a voluntary organization independent of any one state, composed of public and private institutions, receiving its funding from member dues and gate receipts, and without any authority or powers normally reserved to the State. Purporting to apply *Brentwood I* (and, presumably, using its new entwinement standard), the Second Circuit theorized that the plaintiff *might* be able to plead facts that somehow fit within this essentially undefined framework. *Id.* In so doing, the Second Circuit attempted to distinguish *Tarkanian* by reliance on *dicta* as the supposed alignment of interests between UNLV and Coach Tarkanian or the bench trial accorded Tarkanian but not

[6] *Amicus* understands that this Court is well aware of the facts and the holding of *Tarkanian* and will discuss only those portions of the opinion necessary to its argument.

Cohane. Slip Op. at p. 5. However, *none* of the Second Circuit's ersatz "distinguishing features" had played any part in this Court's holding in *Tarkanian*. In effect, the Second Circuit held that, under certain unknown and unknowable circumstances left open by *Brentwood I* and contrary to *Tarkanian*, the NCAA may or may not be a state actor. This cavalier disregard of *Tarkanian* in favor of the all enveloping state action "entwinement" doctrine is all the more disturbing because it did so in a "summary opinion;" one that is unpublished and, supposedly, an unremarkable statement of well-accepted law. *See* 2d Cir. L.R. 0.23. In reality, it is nothing of the sort.[7]

Justice Thomas' dissent in *Brentwood I* eerily predicted the unrestrained expansion of state action evidenced by *Cohane*. In refuting the majority's invocation of *Brentwood I* as being ostensibly consistent with *Tarkanian*, the dissent observed:

> Indeed, the reference to *Tarkanian* is ironic because it is not difficult to imagine that application of the majority's entwinement test could change the result reached in that case, so that the National Collegiate Athletic Association's actions could be found to be state action given its large number of public institutional members that virtually control the organization.

531 U.S. at 314 n. 7 (Thomas, J., dissenting).

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[7] Although it is not cited in *Cohane*, the Second Circuit's unchecked application of *Brentwood* is presaged by its opinion in *Tancredi v. Metropolitan Life Insurance Co.*, 378 F.3d 220, 229 (2d Cir. 2004), which holds that after *Brentwood*, as a practical matter, there can virtually never be a frivolous or unfounded allegation of state action under the expansive "entwinement" framework. *Cohane* has proven the Circuit true to its word.

As foretold by the dissent, *Cohane's* reliance on *Brentwood I* well illustrates the problems inherent in announcing a new rule without form or substance. Indeed, the new standard effectively allowed the Second Circuit to all but disregard the facts central to *Tarkanian's* holding: that the NCAA has "no governmental powers to facilitate its investigation . . . no power to subpoena witnesses, to impose contempt sanctions, or to assert sovereign authority over any individual." 488 U.S. at 197. Because the TSSAA's authority is similarly limited, the Sixth Circuit's state action holding here likewise contravenes *Tarkanian.* The only logical way to square this disregard for the uncontroverted facts is to presume that the lower courts read *Brentwood I* as substantially altering, if not entirely overruling, the framework articulated by *Tarkanian.*

As *Cohane* illustrates, *Brentwood I* gives bodies such as the NCAA, Petitioner or virtually any private quasi-regulatory body conceivably "entwined" with the State no pragmatic, meaningful way of knowing when or how it may be found to be a state actor. With an almost unrestricted universe of possible facts, an entity could be found to be a state actor during the course of an administrative proceeding, following discovery or motion practice in litigation or, as was the case here, following a determination on appeal.

Another practical implication of *Brentwood I* can be seen by examining the facts of the case at bar. If the TSSAA is indeed a state actor, it will be faced with numerous Hobbesian choices. For example, should it be subjected to any level of First Amendment scrutiny, would courts limit *Brentwood I* to the recruiting violations asserted here, or would private schools be able to challenge standards governing the fight songs played by "pep bands,"

banners flown at athletic events, controversial calls (or player/coach ejectments) by officials, or even the rules of a particular sport? As noted by the TSSAA in its Petition for Certiorari, *Brentwood I* places a voluntary association of private actors in the incongruous, unfair position of having less ability to enforce the rules its own members have adopted than the State itself would have to enforce speech restrictions against its employees. *See* Petition for Certiorari, at 27 (citing *Snepp v. United States*, 444 U.S. 507 (1980)). Likewise, faced with the unavoidable uncertainty of the "entwinement" doctrine, bodies such as the TSSAA would have strong incentive to exclude the Brentwood Academies of the world, a choice that itself is both undesirable and fraught with other potential legal consequences. *Id.* at 30. The consequences of not doing so, however, would be equally deleterious, leaving such entities to face unfettered litigation they can neither afford nor wait to wend its way through a maze of courts. *See* Braig, *supra,* at Sports L. Rev. 343, 364-65.

In precisely the same manner, the Sixth Circuit's finding of a Due Process violation raises the specter of still additional uncertainty. Perhaps because the TSSAA is a voluntary association comprised of secondary schools that have *agreed* to abide by a set of rules for resolving grievances, the Sixth Circuit frankly conceded that "[t]here is no applicable precedent that describes the precise process a school such as Brentwood should receive from a state athletic association. . . . " *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 442 F.3d 410, 436 (6th Cir. 2006). There is good reason for this. The Sixth Circuit could find no other instance of a wholly voluntary, private and self-governing organization being subject to the Due Process constraints imposed by *Brentwood I*. Instead, it was reduced to searching for guidance from

such inapposite authority as *Parratt v. Taylor*, 451 U.S. 527 (1981). 442 F.3d at 433. Comparing the normative procedural hearing standards accorded by an unquestionable state actor – a corrections institution in *Parratt* – with those in the case at bar only serves to underscore the inherent defect in treating private, contractually mandated regulatory schemes as public.

Put simply, *Brentwood I* was what the dissent said it was: a misguided attempt to articulate a new, deeply flawed standard for determining state action. As such, the principle of *stare decisis* does not require blind deference to *Brentwood I* for at least three compelling reasons. First, because the case "involved an interpretation of the Constitution, and the claims of *stare decisis* are at their weakest in that field, where [the Court's] mistakes cannot be correct by Congress," there exists little restraint on this Court to remedy a wrongly decided decision. *See Payne v. Tennessee*, 501 U.S. 808, 828 (1991). Fundamentally, it is within the exclusive province of this Court to determine whether state action exists sufficient to bring an otherwise private actor under the penumbra of acting under "color of law." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *United States v. Nixon*, 418 U.S. 683, 705 (1974).[8] Second, such considerations are "doubly weak" where, as here, the majority's opinion in *Brentwood I* evinces an "inability to enunciate [a] judicially discernable and manageable standard that it thought existed. . . ." *Vieth v. Jubelirer*, 541 U.S. 267, 305 (2004); *see also BMW of North America, Inc. v. Gore*, 517 U.S. 559, 599 (1996) (Scalia, J., dissenting) (decisions insusceptible of principled application are not entitled to *stare decisis* effect); *Patterson v.*

[8] The Federalist No. 78, pp. 523, 525 "[t]he interpretation of the laws" would be "the proper and peculiar province of the courts."

McLean Credit Union, 491 U.S. 164, 173 (1989) ([W]e have overruled our precedents when subsequent cases have undermined their doctrinal underpinnings. . . ."). Finally, stare *decisis* should not constrain this Court to act where, as here, the decision at issue departs from prior precedent.

This Court should overturn *Brentwood I* and restore its pre-existing, well-established standards for determining state action.[9]

III. Competitive Equity Is Always a Substantial, Although Not a State, Interest

In the study of civil religions, our thinkers have too much neglected sports. It is the fashion, nowadays, to swing out wildly at all established institutions, including sports. It is true that sports often tell us a great a deal about a people – but almost as tea leaves tell us about the future.[10]

* * * *

[9] As stated herein, *Amicus* believes *Brentwood I* was wrongly decided and unnecessarily casts an opaque cloud over the meaning and ordinary application of the state action doctrine. While *Cohane* provides one concrete example of this, the Second Circuit's failure to properly apply *Tarkanian* itself was in error and continues to be at issue in that litigation, wholly apart from whether *Brentwood I* is upheld. At this printing, the NCAA has moved for panel rehearing/rehearing *en banc* in that case and, if denied, intends to seek certiorari review before this Court.

[10] Michael Novak, *Endzones, Bases, Baskets, Balls, and the Consecration of the American Spirit*, Madison Books, rev'd Ed. (1994).

Nothing reveals humanity so well as the games it plays. . . . Actually, you reveal yourselves best in how you play.[11]

The Sixth Circuit's attempt to impose a First Amendment and Due Process regime upon the TSSAA, and require it to show substantial "state" interest in enforcement of its recruiting rules, only serves to illuminate the infirmities inherent in *Brentwood I*'s state action holding. In other words, this case provides a troubling example of the consequences of defining state action too broadly. In such cases, as here, there can never be a substantial *state* interest – precisely because the action at issue is not itself *state action* but, rather, action in which only the interests of private actors are pervasive and substantial.

Accordingly, the state action ruling in *Brentwood I* leaves open problematic, perhaps logically unanswerable questions. Beyond determining that the TSSAA is a "state actor," in remanding this case to the Sixth Circuit, this Court gave virtually no guidance on how lower courts should apply the constitutional mandates that follow from this conclusion. It is hardly surprising, therefore, that both District Court and the Sixth Circuit struggled with – for example – the level of scrutiny given to First Amendment restrictions in the context of interscholastic athletics.

This flaw is perhaps best exemplified by the lower court's apparent disregard for the importance of "competitive equity," *see* 442 F.3d at 427-28, a notion of fair play that transcends all sporting activities. The Sixth Circuit's holding that an interest in a "level playing field" is not comparable with what it characterized as substantial

[11] "Q," Star Trek: the Next Generation, "Hide and 'Q'", September 25, 1987 (Act One).

"state" objectives concerning academics, athletics and student exploitation, is testament to why the TSSAA, not the courts, should determine its own rules of the game.[12]

In this regard, *Amicus* respectfully suggests the second question raised by Petitioner, the substantial importance of competitive equity in interscholastic sporting events, does not turn on the Sixth Circuit's erroneous application of First Amendment law, nor does it depend on the level of scrutiny applied under that constitutional edict. Rather, the critical role played by competitive equity in all sport only serves to illustrate, in fact dispositively, that organizations governing such activities should not be held to be state actors. Courts have explicitly found that oversight of sport is not a traditional function of the state and, accordingly, the state itself has no interest in promotion or dissuasion of any specific sport objective. *See San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 545 (1987) ("[n]either conduct nor the coordination of amateur sports has been a traditional governmental function."). This, however, in no way leads to the conclusion that competitive equity is not a critical component of sport regulation or oversight by bodies constituted for this purpose. To the contrary, notions of essential fairness and equity pervade all levels of

[12] By stressing the wider import of competitive equity to all sports, the NCAA does not intend to suggest that this interest "outweighs" concerns over student-athlete exploitation and the primacy of academics in the interscholastic and intercollegiate context. All three are substantial interests that the NCAA and Petitioner share. The fact that competitive equity transcends scholastic sport – and, as noted below, sport itself – merely illustrates how ill-suited courts such as the Sixth Circuit are to evaluate and weigh these substantial interests.

sport, from little league to intramural basketball to amateur and professional sports.

The NCAA's own Constitution cites competitive equity as a fundamental purpose of the Association. *See* NCAA Const. §§ 1.2, 1.3.1 and 2.7. This is not simply an empty creed: to ensure fairness and balance among its members, the NCAA employs its own Research Staff that conducts ongoing studies of trends, data and characteristics of intercollegiate sports, including monitoring competitive equity through examination of, for example: (1) student-athlete performance; (2) race and gender demographics; (3) graduation rates; (4) the use of performance-enhancing substances; and (5) the impact of wagering and associated behaviors on collegiate sports. *See NCAA Research Staff,* http://www.NCAA.org. The NCAA consistently monitors these and other areas to promote the same three interests asserted by the TSSAA on behalf of student athletes, including providing a level playing field for all. The State plays *no* role in promoting, furthering or assisting in these goals. Yet, it is beyond any doubt that they are goals which are substantially important to amateur sport in the United States.

Not only does the State itself have no interest in the promotion or oversight of amateur athletics, *San Francisco Arts & Athletics, Inc*, 483 U.S. at 545, because the voluntary competitive bodies which do govern interscholastic activities have the real expertise in this area, states and the courts should accord great deference in their affairs. *See Mahan v. Oklahoma Secondary Sch. Activities Ass'n*, 652 P.2d 765 (Okla. 1982) ("Surely the schools themselves should know better than any one else the rules under which they want to compete with each other in athletic events").

In attempting to "micromanage" the TSSAA and second-guess its application of rules agreed to by all of its members including Brentwood Academy, the Sixth Circuit erroneously substituted its judgment for that of the one body that actually has the incentive, expertise and ability to ensure fairness: the TSSAA. As succinctly put by the Fifth Circuit Court of Appeals over twenty years ago: "We are not super referees over high school athletic programs. Questions about eligibility for competition may loom large in the eyes of youths, and even their parents. We do not disparage their interest in concluding, as here, that these issues are not of constitutional magnitude." *Hardy v. University Interscholastic League*, 759 F.2d 1233, 1235 (5th Cir. 1985); *see also NCAA v. Yeo*, 171 S.W.3d 863, 863-64 (Tex. 2005) (citing *Hardy* with approval and holding that disputes concerning the administration of interscholastic sports are best left to schools, and are not the concern of courts or the Constitution).

There is yet another compelling reason why states (and courts) should refrain from meddling in the affairs of voluntary organizations such as the TSSAA and *Amicus*. Rules alone cannot foster competitive equity if they cannot be applied consistently. In the case of the NCAA, courts have ruled that state attempts to "overrule" its practices and procedures run afoul of the Commerce Clause. *See NCAA v. Miller*, 10 F.3d 633, 638 (9th Cir. 1993); *NCAA v. Roberts*, No. 94-40413, 1994 WL 750585 (N.D. Fla. Nov. 8, 1994). *Miller*, for example, involved the State of Nevada's attempt to legislate around this Court's ruling in *Tarkanian*, and place state law above the NCAA's enforcement procedures. The Ninth Circuit struck down the Nevada law, holding that piecemeal state legislation attempting to regulate the NCAA's national practices and procedures

violated the Commerce Clause. *Miller*, 10 F.3d at 638. Just as the Commerce Clause prevents states from dictating differing lengths for railroad cars, so must the NCAA be afforded consistent treatment by the states to accomplish its national purpose. *Ibid.* To the great extent Petitioner regulates Tennessee athletics across the broad spectrum of different high schools, public and private, while not implicating the Commerce Clause, the TSSAA has precisely the same need for consistency which would be frustrated by different state courts reaching disparate conclusions regarding the application of its rules.

To be sure, the Sixth Circuit's failure to find a "substantial state interest" in competitive equity rested on the fundamentally flawed assumption of state action. Yet, even where state interests *are* at stake, for example in the field of anti-trust, laws and courts are committed to do precisely the same thing that the TSSAA has attempted here: make certain that competing interests are given a level playing field with no unfair advantage to either side. *See, e.g., State Oil Co. v. Kahn*, 522 U.S. 3, 14 (1997); *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 726 (1988). Indeed, entire federal governmental departments such as the Securities and Exchange Commission have been created to ensure fairness in the securities markets. *See* 15 U.S.C. § 78n(e), *et seq.* Similar considerations have driven legislation and rule-making in such diverse areas as communications (*see* 47 U.S.C. § 251(c), (Communications Act of 1996); *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 488 (2002)), interstate trade (*see Maine v. Taylor,* 477 U.S. 131, 148, n. 19 (1986)), and international trade (*see* 19 U.S.C. § 1526). For similar reasons, even if the TSSAA were deemed to be a state actor, these authorities strongly suggest that any reasonable

"intermediate scrutiny" analysis would necessarily presume competitive equity to be a substantial state interest.

Among all competitive endeavors, the substantial importance played by competitive equity is readily apparent. Likewise, it is axiomatic that those most deeply concerned with fostering and preserving such equity are best suited to determine how to achieve this critical objective. By erroneously placing its own judgment above that of the TSSAA, the Sixth Circuit inadvertently proved just how unsuited the State and the courts are in making value judgments regarding the ends and means of amateur sports. The awkward application of the First Amendment "state interest" test, 442 F.3d at 427-28, merely confirms that organizations like the TSSAA cannot be contorted into "state actors" without resulting in egregious injury to their very purpose and mission.

For all of these reasons, the length of the field, the size of the ball, the number of players and who can play, the seasons of play and practice, as well as the innumerable other critical elements of sports are best left to those who organize and play them. The substantial importance of these considerations are undeniable in the world of sport; they are equally of no consequence to the State, the courts or the Constitution.

CONCLUSION

Amicus respectfully suggests that this Court's prior decision in *Brentwood I* was wrongly decided, inadvertently creating a new "state action" rule without foundation in existing precedent and which is incapable of principled application. The confusion among the lower

courts as to the meaning of "entwinement" is pronounced and quickly growing. Under the circumstances, deference to *stare decisis* can and should give way to providing private individuals and organizations such as Petitioner and *Amicus* meaningful guidance before placing upon them the burden of the many substantial Constitutional obligations intended to be imposed upon the State.

Respectfully submitted,

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In the Supreme Court of the United States

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION,

Petitioner,

v.

BRENTWOOD ACADEMY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* OF NATIONAL FEDERATION OF STATE HIGH SCHOOL ASSOCIATIONS IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

The National Federation of State High School Associations ("NFHS") is the national service and administrative organization of high school athletics.[1] Founded in 1920, the NFHS is composed of one high school athletic or activities association in each of the fifty states and the District of Columbia. About ninety percent of the high schools in the United States are members of state high school associations that are in turn members of the NFHS.

The NFHS's mission is to provide leadership and national coordination for the administration of interscholastic activities, including athletics. The NFHS works to enhance the educational experiences of high school students and to reduce the risks arising from their participation in interscholastic athletic programs. The NFHS strives to promote participation and sportsmanship, to develop good citizens through activities that provide equitable opportunities, and to maximize the achievement of educational goals. The objectives of the NFHS include the protection of interscholastic athletics and the development of solutions to problems related to interscholastic athletics at the high school level.

Based on the purposes underlying the NFHS and its objectives, the NFHS has a strong interest in whether

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[1] Pursuant to Supreme Court Rule 37.6, the *amicus* states that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than the *amicus*, its members, and its counsel, contributed monetarily to the preparation or submission of this brief. The parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.3, letters evidencing this consent have been filed with the Clerk.

recruiting for athletic purposes at the high school level can be properly regulated by state high school associations. If this Court affirms the judgment in favor of Respondent Brentwood Academy on its First Amendment claim, the ability of state high school associations to regulate athletic recruiting, and to prevent the inequities that it engenders, will be significantly compromised.

SUMMARY OF ARGUMENT

Brentwood Academy's First Amendment challenge to the Anti-Recruiting Rule of the Tennessee Secondary School Athletic Association ("TSSAA") poses a nationwide threat to high school athletics. Every state high school athletic association in the United States forbids athletic recruiting at the high school level. These associations collectively consist of 18,654 schools and represent over seven million student-athletes.

State associations prohibit recruiting for good reason. High school athletics are and should remain an educational experience, as well as a source of pride and cohesion for student bodies, parents, and communities. Recruiting for athletic purposes threatens these goals by making competition unfair, in that it allows private schools to entice superior athletes from wide geographic areas, while the public schools against which they compete are largely limited to students within defined geographic boundaries.

The Sixth Circuit's opinion limiting enforcement of the TSSAA Anti-Recruiting Rule has implications for high schools nationwide. The decision will have a chilling effect on the enforcement of comparable rules in other states. It threatens the current competitive balance between private and public schools, and promises to increase dissension between

them. By allowing anti-recruiting challenges on a case-by-case basis, it also encourages litigation and harms the finances of state high school associations.

Fairness in athletic competition supports quality academics; unfairness works the opposite result. The current state of big-time college athletics, where recruiting is "legal," provides a cautionary example. Too many Division I college athletic programs have strayed from their educational missions and brought discredit to their institutions. There is no reason to believe that allowing high school recruiting would produce a happier result. By allowing Brentwood to circumvent the anti-recruiting rule to which it agreed, the Sixth Circuit has set an unfortunate precedent that high schools nationwide will be tempted to follow. An unfair competitive environment – which recruiting encourages – will harm American secondary education.

ARGUMENT

The NFHS believes that the primary mission of United States high schools should be to foster academic education. While the NFHS views cocurricular activities,[2] including athletics, as an integral part of the high school experience, those activities should remain consistent with the schools' academic missions. The recruiting encouraged by the Sixth Circuit's decision would change the existing balance between athletics and academics, and would undermine the sense of

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[2] The phrase "extracurricular activities" is commonly used to refer to activities that supplement the academic aspect of high school education. Many educators, however, prefer the use of the term "cocurricular activities" based on their belief that such activities, when kept in their proper context, are inherently educational and support the academic mission of schools.

community that gives a uniquely local character to high school sports.

I. The Uniform Enforcement of Anti-Recruiting Rules is Important to High School Athletics.

State high school athletic associations are comprised of professional educators, most of whom are school principals. The fact that these educators have uniformly and consistently enacted anti-recruiting rules is telling. As the NFHS 2006-07 Handbook explains in identifying reasons to limit high-school recruiting:

> A recruiting/undue influence prohibition discourages exploitation of students; prevents over-emphasis of athletics; gives average student-athletes more opportunity to participate; discourages adults from jeopardizing students' eligibility; and prevents misuse of athletic programs.

NATIONAL FEDERATION OF STATE HIGH SCHOOL ASSOCIATIONS, 2006-07 HANDBOOK 20 (2006).

Competitive equity is essential to athletic competition. This simple truth is grasped by nearly everyone, from children who take turns picking team members to professional sports teams that have draft and salary restrictions. "[T]he very existence of a game to play, let alone a championship race to savor, requires that the participants cooperate off the field to create a fair and balanced match-up on the field." PAUL C. WEILER, LEVELING THE PLAYING FIELD 2 (2000).

Competitive equity also promotes classroom education — in fact, athletics are an extension of the classroom. The TSSAA Constitution recognizes that "the primary objective of

all secondary schools is to educate youth" and that "the athletic field and the gymnasium are classrooms in which teaching is foremost in the development of character, integrity, sportsmanship, and teamwork." If students perceive that competition is unfair, its educational value is compromised. Indeed, students will eventually stop participating if they decide competing is futile. Jack Roberts, the Executive Director of the Michigan High School Athletic Association, testified below that an anti-recruiting rule is necessary for a fair competitive environment because without such a rule, students who lose games consistently will lose the willingness to compete. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 304 F.Supp.2d 981, 993 (M.D. Tenn. 2003), *rev'd in part on other grounds*, 442 F.3d 410 (6th Cir. 2006). Anti-recruiting rules like those promulgated below by the TSSAA preserve competitive equity and enhance the athletic experiences of American high school students. Without such rules, competitive equity suffers, to the detriment of American secondary education.

The Court has already recognized that high school athletic programs play an "integral" role in secondary schools. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 289 (2001). Recruiting weakens this integral role by undermining the fairness of competition. Recruiting also displaces students who have worked their way up to team membership or starting positions at their schools, leading to disharmony among students, weakened school spirit, and a loss of community support for interscholastic activities. Finally, recruiting draws coaches away from their teaching responsibilities by requiring them to spend time and resources pursuing students solely for non-academic purposes.

The Sixth Circuit's opinion promotes recruiting at the expense of academics. The judgment below should be

reversed or modified to allow reasonable restrictions on high school recruiting.

II. Anti-Recruiting Rules Are Important to NFHS Members and Necessary to Preserve the Competitive Balance Between American Public and Private High Schools.

Anti-recruiting rules are also vital to NFHS members. Though each of the 50 states and the District of Columbia has an athletics or activities association, participation by private schools in these associations is entirely voluntary. Some private schools, including prominent ones like Oak Hill Academy in Virginia and Mount Zion Academy in North Carolina, choose not to join state high school associations because they do not want to be bound by the associations' rules. While these schools have successful athletic programs, they deliberately forego the opportunity to compete in association-sponsored championship tournaments in return for other benefits, particularly the ability to recruit freely. Here, however, Brentwood chose to join the TSSAA so it could compete against other TSSAA schools. In so doing, it contractually agreed to be bound by the TSSAA's rules of competition, including the anti-recruiting rule, which collectively ensure the fairness of competition between public and private schools. Waiving the right to recruit in return for broader competitive opportunities is a reasonable restriction to which Brentwood and TSSAA should be free to agree.

If anti-recruiting rules like the one now at issue become unenforceable, the fragile competitive balance between public and private high schools will be disturbed, and dissension between them will likely increase. If high school recruiting is expanded, public and private schools would no longer be on equal footing, and both would be harmed. Public schools

would be disadvantaged because, unlike private schools, they generally would be limited to students within their set geographic boundaries. Private schools, with their rosters enhanced by recruiting, would find fewer and fewer public schools willing to compete against them. Such a fractured competitive environment is not constitutionally necessary, and the Court should strive to avoid it.

The decision below also threatens the finances of the state associations that are NFHS members. The decision encourages future litigation because the Sixth Circuit essentially analyzed whether Brentwood's particular violation of the anti-recruiting rule was harmless. This analysis ignores the Court's precedent instructing that the correct inquiry is not whether a rule's purposes are promoted when applied to a particular plaintiff, but whether a rule is justified generally by substantial state interests. *See Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 468 (1978). Under the Sixth Circuit's approach, anti-recruiting rules would lose their deterrent effect because parties would be allowed to challenge the rules' enforcement in particular cases and argue that their purposes are not furthered in specific contexts. Because state associations have limited financial means, *any* threat of litigation, much less the widespread threat the Sixth Circuit's analysis promises, will have a chilling effect on these organizations' ability to investigate and enforce their rules. This separate ground supports reversal of the Sixth Circuit's decision.

III. Recruiting Has Already Harmed Intercollegiate Athletics, and Promises To Harm High-School Athletics As Well.

The college experience foretells the harms that expanded recruiting will bring to American high schools. Big-time

college athletics are too often driven by winning and revenue generation at the expense of academic achievement. And recruiting is at the core of the problem.

As far back as 1989, the Knight Commission, a group composed of prominent educational and athletic leaders, concluded that so many abuses already existed in college athletic recruiting that the balance between academics and athletics was all but lost. *See* Knight Commission on Intercollegiate Athletics, *Keeping Faith with the Student Athlete: A New Model for Intercollegiate Athletics.*[3] The Knight Commission reconvened in 2001 and determined that despite considerable effort, the problem had worsened. *See* Knight Commission on Intercollegiate Athletics, *A Call To Action: Reconnecting College Sports and Higher Education.*[4]

Others have recognized the adverse effects of recruiting on college students:

> Recruited athletes earn far lower grades than what might be expected on the basis of their incoming academic credentials and demographic characteristics. This striking "underperformance" phenomenon appears to be related directly to the criteria used in recruiting and admitting these athletes – and not to time commitments, differences in race or socioeconomic status, field of study, or the intensity of the athletic experience. Recruited athletes

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[3] http://www.knightcommission.org/about/keeping_faith_download_a_pdf_of_this_publication/ (March 1991).

[4] http://www.knightcommission.org/about/reports/category/A%20Call%20to%20Action/ (June 2001).

> underperform even in seasons or years when they are not participating in athletics.

WILLIAM G. BOWEN & SARAH H. LEVIN, RECLAIMING THE GAME: COLLEGE SPORTS AND EDUCATIONAL VALUES 328 (2003). The profoundly negative impact recruiting has had at the college level, particularly in football and men's basketball, has even caused concern in the United States Congress. In 2004, a House of Representatives subcommittee conducted a hearing entitled "College Recruiting: Are Student Athletes Being Protected?" *See* The Committee on Energy & Commerce, *College Recruiting: Are Student Athletes Being Protected?*[5]

Recruiting at the college level is not only at odds with the fundamental academic mission of American schools, but it can injure students in other ways:

> This evidence [from Bowen and Levin's book *Reclaiming the Game*] suggests that inter-community recruiting can pollute the educational value of the interscholastic athletic environment by sending the message to students that the external, competitive value of athletics in the form of glory and profit is more valuable to the student than the student's internal academic and social development. This evidence suggests that inter-community recruiting can pollute students by sending the message that developing one's athletic assets (which for all but a tiny percentage of students are wasting assets) for consumption by others is more valuable to the student than developing one's

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[5] http://energycommerce.house.gov/108/Hearings/03112004hearing1226/hearing.htm (March 11, 2004).

> academic and social assets (which for all students are appreciating assets) for one's own personal growth and benefit.

Kevin P. Braig, *A Game Plan To Conserve the Interscholastic Athletic Environment After Lebron James*, 14 MARQ. SPORTS L.J. 343, 357 (2004).

High school students recruited for athletic prowess may similarly develop a false sense of superiority and a self-image grounded solely in athletics. The reality is that less than one percent of high school athletes will ever compete professionally. Many of these recruited athletes, once denied a career in professional sports, may lack the academic tools they need to succeed in society.

Anti-recruiting rules like the one enacted in Tennessee can help lessen the tendency of top athletes to view sports as the only important part of their lives, a view that can lead to the use of performance-enhancing drugs, over-use injuries, missed classes, and premature specialization in a single sport. Such rules can also restrain adults from exploiting student athletes for their own financial gain or recognition.

Allowing high school athletic recruiting to expand will not serve the interests of America's student-athletes. High-school educators prohibit recruiting for good reason, and the courts should support rather than hinder their efforts whenever possible.

CONCLUSION

High school athletic competition has a proud tradition, one the NFHS wants to preserve. Recruiting is antithetical to high school educational athletics. It is at odds with what should be

the schools' primary academic mission. The Sixth Circuit's opinion limiting enforcement of high school anti-recruiting rules is a step backward in American education. The judgment below should be reversed.

Respectfully submitted,

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(3)

No. 06-427

In The

Supreme Court of the United States

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION,

Petitioner,

v.

BRENTWOOD ACADEMY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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STATEMENT OF INTEREST[1]

The National School Boards Association (NSBA) is a not-for-profit federation of state associations of school boards across the United States. Its mission is to foster excellence and equity in public education through school board leadership. NSBA achieves that mission by representing the school board perspective before federal courts and government agencies.

NSBA represents 95,000 local school board members, virtually all of whom are elected. These local officials govern 14,890 local school districts serving the nation's more than 47 million public school students.

NSBA has participated as an amicus curiae in numerous cases before this Court that implicate the ability of school boards to carry out their responsibilities, including cases involving First Amendment speech issues raised by students, employees, and outside parties, such as *Morse v. Frederick*, No. 06-278 (*cert. granted* Dec. 1, 2006); *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993); *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); and *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

This case implicates the ability of NSBA's members to determine the role that interscholastic sports will play within their schools, as well as their ability to structure their relationships with the many students, parents, and outside parties with whom they come into contact while carrying out their responsibilities.

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[1] The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to this Court's Rule 37.6, *amicus* states that none of the parties or its counsel wrote the brief in whole or in part and that no one other than *amicus* and its counsel made any monetary contribution to the preparation or submission of the brief.

SUMMARY OF ARGUMENT

When private parties who agree to contractual conditions in return for a discretionary government benefit later challenge those conditions under the First Amendment, this Court has applied a deferential standard of review to the government's actions. Two lines of cases have established this general proposition. First, the government can restrict the speech of government employees and independent contractors when that speech involves only matters of private concern and the restriction relates to the government's interest in effectively carrying out its goals. Second, the government can impose a speech-restrictive condition on the recipients of government subsidies as long as the condition furthers the government's legitimate purpose in offering the subsidy and does not lead the recipient to violate an independent constitutional provision.

Because the relationship between the Tennessee Secondary School Athletic Association (TSSAA) and Brentwood Academy (Brentwood) fits squarely within this Court's First Amendment contract jurisprudence, this Court should uphold TSSAA's enforcement of the recruiting rule as reasonable. In this case, TSSAA offered Brentwood the discretionary benefit of participating in its athletic league in exchange for compliance with the terms of its membership agreement, which included the challenged recruiting rule.

The recruiting rule itself is a reasonable contractual term, directly related to a school's participation in an interscholastic athletic league. Restrictions on athletic recruiting of adolescent students can contribute materially to a number of important educational values. They emphasize the priority of academics over athletics. By helping to maintain competitive balance among schools, they encourage broader participation, thereby maximizing the pedagogical benefits of athletics. And they keep scholastic athletics safe for participants. By contrast, any countervailing First Amendment interests are minimal at best: the speech in this case involved matters of

only private concern – namely, the opportunity for twelve eighth grade students to participate in spring football practice.

In striking down the recruiting rule, the Sixth Circuit committed three key errors. First, the court of appeals improperly characterized the recruiting rule as a regulatory ordinance, rather than a contractual term, and applied the far more searching First Amendment test applicable to unilateral government regulation, rather than the more properly deferential test that applies when the government acts as a contracting party. Second, the court of appeals failed to recognize TSSAA's significant education-related interests in ensuring competitive equity. Finally, the court of appeals improperly elevated the speech at issue to a matter of public concern by confusing that inquiry with the entirely distinct inquiry into whether the government's *restriction* of speech serves a public purpose.

The standard deference accorded to government action in contractual cases is reinforced here because TSSAA was acting in its educational capacity. When this Court labeled TSSAA a state actor, it did so because of extensive entwinement with both public schools and the Tennessee State Board of Education. *Brentwood v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 299-302 (2001) ("*Brentwood I*"). If such entwinement is enough to make TSSAA a state actor, then TSSAA, like the public bodies with which it is entwined, should be treated as an educator.

This Court has long recognized that educational decisions are "[b]y and large . . . committed to the control of state and local authorities." *Goss v. Lopez*, 419 U.S. 565, 578 (1975) (internal quotations omitted). This recognition reflects important principles of federalism, the specialized competence of educational policymakers, and institutional limitations of the federal courts to effectively implement educational policy. All of these factors point to deference to TSSAA's judgment here.

ARGUMENT

I. When The Government Contracts With Private Parties, First Amendment Challenges To Contractual Terms, Such As TSSAA's Recruiting Rule, Should Be Analyzed Under The Deferential Standard Used In This Court's Government Employee And Conditional Spending Cases.

Governments can interact with citizens in two distinct ways: they may unilaterally regulate as a function of their sovereignty or they may bilaterally contract with consenting private parties. While the Constitution of course applies to exercises of both regulatory and contractual powers, constitutional claims are assessed differently in each context. In the latter, contractual, context, this Court has applied a decisively more deferential standard of review to First Amendment challenges. The court of appeals failed to apply the correct legal standard, and thus its judgment should be reversed.

This case concerns a voluntary contract between a state actor (TSSAA) and a private party (Brentwood Academy), renewed annually, in which TSSAA agrees to include Brentwood in its interscholastic athletic league in return for which Brentwood pays dues, Pet. App. 160a, and consents to abide by various rules promulgated by TSSAA, including its limitation on athletic recruitment. *Id.* 159a-66a. In this sense, TSSAA resembles government agencies that pay outside parties who agree to conform their conduct to the government's terms. The terms of TSSAA's contract with Brentwood should thus be analyzed under the deferential standard that this Court has applied in conditional funding and government employee/contractor cases. Instead, the Sixth Circuit incorrectly treated TSSAA's "recruiting rule" as an exercise of sovereign power.

A. The Relationship Between TSSAA And Brentwood In This Case Is Like The Relationship Between A Government And Its Employees Or Contractors.

The government may impose speech-related restrictions on employees or contractors that it may not impose on the public at large when those restrictions contribute to effective government operations. *Waters v. Churchill*, 511 U.S. 661, 675 (1994). Under the government employee and contractor cases, if speech involves "matters only of personal interest" – for example, the sort of work-related matters that arise at any worksite, private or public – the government's response raises no First Amendment concerns "absent the most unusual circumstances." *Connick v. Myers*, 461 U.S. 138, 147 (1983).[2] This Court has applied this test not only to government employees, as in *Connick*, but to independent contractors as well. *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668 (1996).[3] It has reasoned that "[i]ndependent contractors appear to us to lie somewhere between the case of government employees, who have the closest relationship with the government, and our other unconstitutional conditions precedents, which involve persons with less close relationships with the government." *Id.* at 680.

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[2] By contrast, if an employee's speech involves a matter of public concern, then the government may take action based on that speech only if it prevails in "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

[3] "[I]n this case, as in government employment cases, the Board exercised contractual power, and its interests as a public service provider, including its interest in being free from intensive judicial supervision of its daily management functions, are potentially implicated. Deference is therefore due to the government's reasonable assessments of its interests *as contractor*." *Umbehr*, 518 U.S. at 678.

The relationship between TSSAA and Brentwood fits easily within the purview of the *Umbehr* test.[4] Private schools that compete throughout the school year with public schools in an athletic league that is itself a state actor have a relationship with the government that is at least as close as a contractor's. TSSAA has determined that anti-recruiting rules are crucial to preserving the fundamentally educational mission of high school sports. It should be given the latitude extended to other governmental agencies in deciding what contractual restrictions it may impose to advance its legitimate interests. This is especially so because the speech at issue – letters to eighth-graders about spring football practices – does not involve a matter of public concern. *See* Part II, *infra*.

B. The Relationship Between TSSAA And Brentwood In This Case Is Also Like The Relationship Between A Government And A Recipient Of Conditional Funding.

Just as the government may impose speech-related conditions on employees or contractors, so too the government may impose speech-related conditions on funding recipients that it may not impose on the public at large when those conditions contribute to achieving the purposes for which the subsidy is being provided. The government can, for example, "selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program." *Rust v. Sullivan*, 500 U.S. 173, 193 (1991); *see also South Dakota v. Dole*, 483 U.S. 203, 207 (1987).[5] This kind of selective or conditional

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[4] *See Rottmann v. Pa. Interscholastic Athletic Ass'n*, 349 F. Supp. 2d 922 (W.D. Pa. 2004) (applying *Pickering* and holding that recruiting restriction imposed by interscholastic athletic league did not violate First Amendment rights of a coach at parochial member school).

[5] *Dole* sets out four restrictions on the federal spending power. First, the spending "must be in pursuit of 'the general welfare.'"

funding has long applied to private schools: "Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept." *Grove City College v. Bell*, 465 U.S. 555, 575 (1984) (upholding federal funding of higher education conditioned on adherence to the nondiscrimination provisions of Title IX, which can of course preclude certain speech-related or associational activity).

In this case, TSSAA wishes to provide a benefit – membership in an interscholastic athletic league, and in some cases revenue from TSSAA's tournaments – to schools that agree to certain conditions in how they run their athletic programs, including limits on athletic recruitment. The restriction on athletic recruiting is a reasonable method of deterring an activity – aggressive recruiting – that TSSAA does not believe to be in the public interest. Brentwood is not obligated to accept this benefit and its attendant conditions; the school conceded at trial that its participation in TSSAA is voluntary. *See* Pet. Cert. at 3. This concession is reinforced by the fact that many Tennessee private schools have left TSSAA or joined other athletic leagues to pursue goals incompatible with TSSAA's. *See id.* at 2.

Dole, 483 U.S. at 207. Second, any conditions imposed on a recipient must be "unambiguou[s]." *Id.* Third, any conditions must be "german[e]" – that is, related to the activity being subsidized. *Id.* at 208. Finally, "other constitutional provisions may provide an independent bar" to a particular condition. *Id.*

To be sure, this case involves state-imposed conditions rather than federal ones. While there might be a few exceptional instances where a state's power to subsidize is more limited than the federal power – if, for example, the subsidy trenches on foreign policy interests or implicates the dormant commerce clause – none of those concerns are implicated in this case. Otherwise, states surely have a power to condition their spending that is at least coterminous with the federal spending power recognized by *Grove City College v. Bell*, 465 U.S. 555 (1984) since state-imposed conditions raise no Tenth Amendment-based concerns.

The recruiting rule satisfies the *Dole* criteria for judging the constitutionality of a condition on government funding. Interscholastic athletics contributes in a number of important ways to the education of secondary school students. Restrictions on athletic recruitment of the kind imposed by TSSAA satisfy the germaneness requirement of *Dole* because they are important to ensuring that athletics does not eclipse academics, that athletics teaches students appropriate and meaningful life lessons, and that athletic participation is physically safe. *See* Part III, *infra*.

The contract between TSSAA and Brentwood also satisfies the other *Dole* criteria. Participation in TSSAA is unambiguously conditioned on compliance with its recruiting rule, making the conditional nature of the subsidy clear in the contractual agreement. *See Grove City Coll.*, 465 U.S. at 575. The precise contours of the condition need not themselves be described. *See Waters*, 511 U.S. at 673 (speech restrictions on public employees are permissible even when the standard of prohibited speech is "almost certainly too vague when applied to the public at large"); *Connick*, 461 U.S. at 153 (supporting a state employee's termination for insubordination even though she "did not violate announced office policy"). The point of this requirement – that the recipients of the government's subsidy be "cognizant of the consequences of their participation," *Dole*, 483 U.S. at 207 – was surely met here: TSSAA expressly says in Section 21 of its publicly available bylaws that membership in its league is conditioned on recruitment restrictions. Pet. App. 162a-63a. Nor does TSSAA's recruiting rule require that Brentwood itself do anything that would violate the Constitution. *See Dole*, 483 U.S. at 210-11 (explaining that the "independent constitutional bar" limitation refers to conditions that would lead the recipient "to engage in activities that would themselves be unconstitutional" such as inflicting cruel and unusual punishment).

That the conditional benefit offered by TSSAA consists largely of the right to participate in its league, rather than of a

more direct financial subsidy, makes no difference to the analysis. A contract that provides consideration in the form of government funds (as in *Rust*, *Dole*, and *Grove City College*) and a contract that provides consideration of some other kind, such as membership in an athletic league, are functionally identical. The only important characteristic, present in both kinds of contracts, is that the government, in order to further a state interest related to the contract, provide the contracting party with something that it could otherwise withhold. This Court recognized in *Grove City College* that "[t]he economic effect of direct and indirect assistance often is indistinguishable," 465 U.S. at 565, as indeed is the case here. For example, TSSAA might work around a court-imposed distinction between conditioned funds and conditioned membership in the league by attaching a nominal monetary subsidy to its recruitment conditions. The subsidy could be offered outright or implicitly in TSSAA's decision to fund certain incidental costs of running the league. Surely there is nothing to be gained by requiring such empty legalistic maneuvers. Just as with the state action doctrine itself, "if formalism were the sine qua non" of what constitutes a subsidy, "the doctrine would vanish owing to the ease and inevitability of its evasion, and for just that reason formalism has never been controlling." *Brentwood I*, 531 U.S. at 302.

C. The Distinction Between Sovereign State Action And Contractual State Action Works Better Than The Sixth Circuit's Taxonomy.

The clean distinction between sovereign state action and contractual state action makes much more sense than the Sixth Circuit's haphazard taxonomy of government-citizen relationships. Categorizing state power as either contractual or sovereign suffices for this case as it did for this Court in *Umbehr*, 518 U.S. at 678, since that distinction neatly addresses the question whether the party on the receiving end of the government's attention agreed to be there. The Sixth Circuit, on the other hand, carves the wide range of possible

relationships into overlapping and ill-defined categories, not presumed exhaustive, including regulatory, funding, subsidy, independent contractor, government speech, and employment. Pet. App. 92a-95a. This level of detail is not only unnecessary but also conceptually misleading. At one point, for example, it leads the Sixth Circuit to conclude that TSSAA's imposition of the recruiting rule is analogous to a unilateral zoning ordinance because this Court described TSSAA's contractual enforcement of its recruiting rule as *regulating* recruitment in its 2001 decision. *Id.* 14a. But many contractual terms, including terms in contracts between private parties, "regulate" the behavior of the parties, and this does not convert them into governmental "regulation"; the Sixth Circuit confuses the two contexts in which the word is used. Later, it also concludes that the contractual nature of the relationship is irrelevant because the state offers membership in the league as consideration instead of the model of money-for-services found in most independent contractor relationships such as highway construction. Adopting such an unsystematic categorization of government relationships with private parties will only encourage further confusion among lower courts.

The court of appeals in this case improperly blurred the line between the government's more constitutionally constrained sovereign power to restrict speech and its greater contractual flexibility by citing *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), and *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975). Pet. App. 95a. Those cases held that when the government erects a public forum and then enters into contracts with parties who want to use the forum, it may not exclude participants based on the content or viewpoint of their speech. But the public forum cases are entirely inapposite. TSSAA is neither a traditional public forum defined "by long tradition . . . devoted to assembly and debate," *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983), nor a designated forum, created when the government "designate[s]

a place not traditionally open to assembly and debate as a public forum," *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985). *See Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677 (1998). Instead, TSSAA is an athletic league designated by the State of Tennessee to facilitate statewide interscholastic sports and not to enable some general form of expression.

In contrast to the Sixth Circuit, other courts have adopted the position we advocate here, finding the distinction between contractual and sovereign powers both workable and preferable. Thus, these courts have enforced private parties' relinquishment of constitutional rights in contracts with the government, as long as the contract was entered into voluntarily and is in the public interest.[6]

II. When A Contracting Party's Speech Involves Only Matters Of Private Concern Directly Related To Its Contractual Undertaking, A State Actor's Right To Enforce Contractual Restrictions Is Particularly Strong.

Brentwood's recruiting letters involve a matter of private concern that is governed by the terms of its contract with TSSAA. Consequently, TSSAA has wide latitude in

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[6] *See Lake James Community Volunteer Fire Dep't v. Burke County*, 149 F.3d 277 (4th Cir. 1998) (enforcing a volunteer fire department's waiver, as part of its service contract with a county, of its First Amendment right to object to a change in the boundaries of its fire protection district); *Leonard v. Clark*, 12 F.3d 885 (9th Cir. 1993) (enforcing a firefighter union's acceptance, as part of its collective bargaining agreement with a city, of a corresponding salary deduction if it exercised its First Amendment right to successfully lobby the state legislature to mandate increased pay or benefits); *Geldermann, Inc. v. Commodity Futures Trading Comm'n*, 836 F.2d 310 (7th Cir. 1987) (enforcing firm's consent to customer arbitration and waiver of its Article III right to independent federal adjudication as part of its membership agreement with the Chicago Board of Trade).

enforcing contractual terms that limit Brentwood's recruiting speech as long as those terms are directly related to Brentwood's participation in the league TSSAA is operating and the terms serve some legitimate purpose.

A. Speech By A Contracting Party That Does Not Touch A Matter Of Public Concern Is Entitled To Only Minimal Constitutional Protection

When private parties make First Amendment claims against the government's enforcement of a contractual limitation on their speech, they must make "an initial showing" that their speech touches on "a matter of public concern." *Umbehr*, 518 U.S. at 685. Conversely, if the speech does not touch on a matter of public concern, then the contracting party should have "no First Amendment cause of action" based on the government's "reaction to the speech." *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1958 (2006) (citing *Connick*, 461 U.S. at 147); *see Umbehr*, 518 U.S. at 685.

Providing less protection in cases involving speech that is of only private concern reflects a well-established principle of First Amendment jurisprudence. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-59 (1985) (plurality opinion) ("We have long recognized that not all speech is of equal First Amendment importance. It is speech on 'matters of public concern' that is at the heart of the First Amendment's protection. . . . In contrast, speech on matters of purely private concern is of less First Amendment concern.") (citing *Connick*, 461 U.S. at 145; *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982); *Carey v. Brown*, 447 U.S. 455, 467 (1980); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978)). Particularly when imposed contractually rather than unilaterally, governmental limits on speech of purely private concern deserve substantial deference.

B. Letters To Eighth Graders About The Place And Time Of Spring Football Practice Do Not Constitute Speech On A Matter Of Public Concern

The "speech" that triggered TSSAA's imposition of sanctions on Brentwood consisted of recruiting letters to eighth graders telling them where and when spring football practice would occur and urging them to attend. *See* Pet. App. 34a-35a. These letters, like many of the communications between schools and potential or actual students, contain no speech on a matter of public concern.

This Court's decisions have established that speech on a matter of public concern must be of "political, social, or other concern to the community." *Connick*, 461 U.S. at 146. Such speech includes criticisms or reports of governmental action or policy and speech related to other such subjects where "free and open debate is vital to informed decision-making by the electorate."[7] *Id.* at 145 (citing *Pickering*, 391 U.S. at 571-

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[7] The protection of public debate and criticism is central to the public concern analysis. Thus, courts have provided First Amendment protection to parties that contract with the government when their criticism has provided information relevant to public debate. For example, a high school teacher's public criticism of the Board of Education's funding allocations between athletic and academic expenses, *Pickering*, 391 U.S. at 571-72, a teacher's criticism of school policy in testimony in front of the state legislature, *Perry v. Sinderman*, 408 U.S. 593 (1972), and a teacher's informing a radio station about a memo from the school principal announcing a new teacher dress code (where the dress code was allegedly prompted by a belief by administrators that faculty dress was tied to public support of bond issues), *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), were each held to be speech that touched on matters of public concern.

The matter of public concern analysis also protects contracting parties' ability to participate in public debate and criticism even where that criticism, although related to public matters, is unrelated

72). The test is sensitive to both context and content: whether the "speech addresses a matter of public concern must be determined by the content, form, and context of a given statement." *Id.* at 147-48. As this Court recently explained, "public concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication." *City of San Diego v. Roe*, 543 U.S. 77, 83-84 (2004).

Connick and *City of San Diego* show why Brentwood's recruiting letters are not a matter of public concern. The content of the letters – the place and timing of a private school's football practice – are matters internal to the football team, relevant to the coaching staff, players, and players' parents, but no one else. The letters do not contain criticism of TSSAA's policies (which would be a matter of public concern, since such speech would pertain to the functioning of a state-run athletic association and invite political debate). Nor is the content of the letters a subject that has news interest of value and concern to the public.

The Sixth Circuit's ruling to the contrary rests on a serious misunderstanding. That court paradoxically concluded that because TSSAA might have to show that the speech *restriction* imposed by TSSAA-Brentwood contract "embodies substantial governmental interests,"[8] any *speech*

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to the contracting government entity. For example, *Rankin v. McPherson* found the political criticism implicit in a statement wishing for the success of future assassination attempts on President Reagan to be speech on a matter of public concern because the statement was made during a discussion of government policies. 483 U.S. 378, 386-87 (1987).

[8] This is itself a mistaken proposition. The government interest need not be so weighty as to be "substantial" – as opposed to simply "legitimate" – if a court applies the sort of balancing test used in government contracting and conditional spending cases. *See* Part I, *supra*.

restricted by the contract "will by definition implicate 'a matter of public concern.'" Pet. App. 9a.[9]

That analysis cannot be the law. Put simply, what the Sixth Circuit was asserting is that whenever TSSAA has a substantial government interest in regulating speech, the speech it is regulating is necessarily a matter of public concern. This leads to the perverse result that the government's ability to restrict speech declines as its legitimate interest in regulating the speech increases. The Sixth's Circuit's reasoning flatly contravenes this Court's decision in *City of San Diego v. Roe*, 543 U.S. 77 (2004). There, this Court recognized that a city police department had a substantial, public interest in limiting the injury to the department's reputation caused by an employee's selling videos on eBay of himself stripping off a police uniform and masturbating. *See id.* at 77. However, the video itself clearly did not speak to a "matter of public concern," and so did not merit First Amendment protection under *Connick* and *Pickering*.

The Sixth Circuit's analysis here rested on a linguistic confusion similar to errors that this Court has noticed and rejected elsewhere. In a case challenging legislative malapportionment, for example, this Court pointed out that "the mere fact that the suit seeks protection of a political right does not mean it presents a political question. Such an

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[9] The 2006 decision adopted the earlier decision's analysis on TSSAA's contract-based arguments wholesale. *See* Pet. App. 89a-90a (explaining that TSSAA's First Amendment arguments were inconsistent with the law of the case).

To be sure, the 2006 decision provided additional reasons for applying intermediate scrutiny. *See id.* 94a-95a. However, the attempts to analogize the facts of this case to application of a municipal ordinance or access to a public forum are unavailing. *See* Part I, *supra*. Furthermore, these newly identified reasons do not redeem the erroneous "matter of public concern" analysis of the Sixth Circuit's 2001 opinion.

objection 'is little more than a play upon words.'" *Baker v. Carr*, 369 U.S. 186, 209 (1962) (quoting *Nixon v. Herndon*, 273 U.S. 536, 540 (1927)). So too here: the mere fact that the government has a "public" interest in regulating certain speech does not mean that the speech itself is on a matter of "public" concern.

Connick itself rules out placing the label "matter of public concern" on a matter of at most limited general interest. There, an assistant district attorney who was unhappy with a transfer distributed a questionnaire to co-workers that asked questions "concerning office transfer policy, office morale, the need for a grievance committee . . . and whether employees felt pressured to work in political campaigns." *Connick*, 461 U.S. at 141. Of these questions, this Court deemed only the last to touch a matter of public concern because of the implications the question had for limiting public employees' ability to voice dissent. *See id.* at 149. The other survey questions were treated as merely reflecting the plaintiff's dissatisfaction with her own transfer. *Id.* at 148. More generally, the Court noted that "[t]o presume all matters which transpire within a government office are of public concern would mean that virtually every remark . . . would plant the seed of a constitutional case." *Id.* at 149. That conclusion applies even more strongly to the speech here, which does not even resemble criticism of the government: to presume that all matters that transpire under a contractual agreement are of public concern plants a constitutional case in every contract term and thereby makes such contracting impracticable.

III. The Strong Governmental Interest In Ensuring Student Safety And Preserving The Educational Value Of Interscholastic Sports Justifies The Imposition Of Bargained-For Restrictions On Participants' Speech.

Every high school sports association in the country with public school members considers it important to promote a

"level playing field."[10] Yet the Sixth Circuit refused to recognize the government's substantial interest in preventing the emergence of gross disparities in talent among teams. The court's error can be traced to its treatment of competitive equity as an end in itself. Pet. App. 100a ("There is very little, if any, evidence, however, explaining *why* competitive equity is an important value in the first place."). But competitive equity is not the ultimate government objective; rather, it is an essential means of advancing the three major educational goals of high school sports.

First, as a definitional matter, interscholastic sports involve *schools*. Thus, educators may conclude that the entire complex of rules governing interscholastic athletics should emphasize the primacy of academic concerns over the pursuit of athletic glory. Second, competition between mismatched teams poses an increased risk of physical injuries to students. Third, rules that avert lopsided match-ups and humiliating defeats ultimately encourage more students to play sports. As this Court has recognized, "[i]nterscholastic athletics obviously play an integral part in . . . public education," *Brentwood I*, 531 U.S. at 299, and it does so precisely because sports are a powerful tool for imparting the values of

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[10] *See, e.g.*, Brief for Mich. High School Athletic Ass'n et al. as Amici Curiae in Support of Petition for Writ of Certiorari, *Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad.*, No. 06-427 (Nov. 29, 2006) ("The MHSAA's primary purpose . . . is . . . to promote a level playing field") (quoting Mich. High School Athletic Ass'n Handbook); Minn. State High School League, http://www.mshsl.org/mshsl/aboutmshsl.asp?page=1 (last visited Feb. 19, 2007) ("The League exists to provide competitive, equitable and uniform opportunities for high school students."); Or. School Activities Ass'n, 2006-2007 Handbook, Mission Statement ("The OSAA will work to . . . provide equitable participation opportunities"), *available at* http://www.osaa.org/publications (last visited Feb. 19, 2007); National Federation of State High School Ass'ns, Mission Statement, http://www.nfhs.org/web/2006/09/mission_statement.aspx (last visited Feb. 19, 2007).

teamwork, discipline, and integrity. It is therefore imperative that educators have the flexibility to structure rules of play to attract as many students as possible to high school sports and to protect them once they decide to play.

To safeguard the essentially educational – rather than athletic – purpose of high school, courts have recognized that schools can condition students' participation in interscholastic sports on carrying a full courseload, passing a minimum number of classes, and satisfying mandatory attendance policies.[11] They have also recognized that athletic leagues should be permitted to impose regulations, on member schools as well as students, designed to encourage students to choose the school they attend based primarily on its academic offerings rather than its sports program. Every state athletic association in the country has some version of an anti-transfer rule that bars students who switch schools from participating in interscholastic competition for a designated period.[12] These

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[11] *See, e.g., Moreland v. W. Pa. Interscholastic Athletic League*, 572 F.2d 121 (3d Cir. 1978) (barring students with excessive absences); *Angstadt ex rel. Angstadt v. Midd-West Sch. Dist.*, 286 F. Supp. 2d 436 (M.D. Pa. 2003) (barring students who fail to meet academic requirements); *Stone v. Kan. State High Sch. Activities Ass'n*, 761 P.2d 1255 (Kan. Ct. App. 1988) (barring students who fail courses from regaining eligibility to participate in interscholastic sports by completing coursework after the end of the semester).

[12] *See e.g.*, Cal. Interscholastic Federation, 2006-2007 Constitution and Bylaws, art. XX, § 214 (barring, for one year, students who transfer to another school from varsity competition in a sport they have played in the past year), *available at* http://www.cifstate.org (last visited Feb. 19, 2007); Mich. High School Athletic Ass'n, Your High School Eligibility: Guide for Student-Athletes (barring students who transfer for athletic reasons from interscholastic competition for two semesters), *available at* http://www.mhsaa.com/resources/eligibility.pdf (last visited Feb. 19, 2007); N.J. State Interscholastic Athletic Ass'n, 2005-2006 Constitution, Bylaws, and Rules, and Regulations, art. V, § 4.K(2)

rules seek to shield impressionable young people and sometimes unsophisticated parents from the invidious suggestion that athletics, not academics, should be a student's highest priority. Such rules fit hand-in-glove with other restrictions on recruitment, and they have consistently been upheld against constitutional challenges.[13]

Courts have also consistently upheld other rules designed to ensure a level playing field because such rules promote student safety and broad participation in interscholastic athletics. For example, consider eligibility rules prescribing age cut-offs for participation in high school sports.[14] It would be not only demoralizing but dangerous for thirteen-year-old freshmen to compete against twenty-year-old seniors. For the

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(barring varsity athletes who transfer to another school from interscholastic competition for at least 30 days), *available at* http://www.njsiaa.org/references/0506eligibilrules.pdf (last visited Feb. 19, 2007).

[13] *See, e.g., In re United States ex rel. Mo. State High Sch. Activities Ass'n*, 682 F.2d 147, 151 (8th Cir. 1982) (upholding transfer rule challenged by private school athletic league, noting that "federal courts have uniformly upheld comparable rules governing transfers against challenges based on both the due process and equal protection clauses," and collecting cases); *Walsh v. La. High Sch. Athletic Ass'n*, 616 F.2d 152 (5th Cir. 1980) (upholding transfer rule challenged by students of parochial school and their parents); *Denis J. O'Connell High Sch. v. Va. High Sch. League* 581 F.2d 81, 87 (4th Cir. 1978) (upholding exclusion of parochial high school from state athletic league because participation of schools lacking attendance zones would make enforcement of transfer rule impossible); *Robbins v. Ind. High Sch. Athletic Ass'n*, 941 F. Supp. 786 (S.D. Ind. 1996); *Ind. High Sch. Athletic Ass'n v. Carlberg*, 694 N.E.2d 222 (Ind. 1998); *Chabert v. La. High Sch. Athletic Ass'n*, 312 So.2d 343 (La. Ct. App. 1975).

[14] *See, e.g., Baisden v. W. Va. Secondary Sch. Activities Comm'n*, 568 S.E.2d 32 (W. Va. 2002) (recognizing that age eligibility rules serve important safety goals that trump even a claim under state disability law by an overage student).

same reason, courts have upheld rules requiring schools to compete only against other schools of a similar size. If large schools, whose student populations give them a better chance of fielding teams comprised entirely of tall, strong, and developed players, were pitted against small schools, the number of mismatches would rise.

Restrictions on recruiting itself further the same important interests served by these other rules – a major reason why they are actively enforced by high school athletic associations.[15] Anti-recruiting rules seek to prevent students from subordinating their academic welfare to their athletic commitments. Like transfer rules, rules that ban or limit contact between coaches and students enrolled elsewhere are simply another method of discouraging students from choosing the school with the winningest football team, rather than the school that will best prepare a student for higher

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[15] *See, e.g.*, Tania Ganguli, *FHSAA Crackdown Continues; A 2nd Girls Basketball Power Is Hammered for Violating Association Rules*, Orlando Sentinel, Jan. 31, 2007 at C9 (Florida High School Athletic Association stripped private school of playoff eligibility for two years and imposed a $5000 fine after three players transferred to the school when it hired the coach from their prior school); Dan McCarney & Burt Henry, *League Drops Cornerstone Christian High School*, San Antonio Express-News, Sept. 14, 2006 at 5B (Texas Association of Private and Parochial Schools expelled a member school for improperly recruiting basketball players with offers of room and board after previously recruiting five players from Mexico, including a future National Basketball Association forward); Christine Willmsen & Michael Ko, *Chief Sealth Stripped of State Titles*, Seattle Times, July 26, 2006 at A1 (Washington Interscholastic Activities Association stripped public high school of two state championships after finding that the coach of the girls' basketball team had lured three students to the school with promises of starting positions and college scholarships and provided fake lease agreements to their parents so that they could enroll without moving from the suburbs).

education or the work force.[16] It would be perverse if officials could forbid students from participating after an improper transfer, but could not penalize the schools encouraging those very transfers. At the very least, organizations such as TSSAA are entitled to deference in determining that significant educational interests justify limits on recruiting speech.

Recruiting restrictions can also reduce the risk of injury. By preventing any one school from amassing a disproportionately large number of big, fast, and skillful athletes, recruiting restrictions reduce the number of mismatched games between mismatched bodies.

Finally, consider the dispiriting effect if schools that recruit across local, state, and even national borders consistently defeat other league participants who are limited to enrolling students from a local neighborhood (as is often the case with public schools). Students at the public schools whose teams consistently lose may become less likely to participate in sports.[17] While part of the value of sports is the rough lesson that sometimes hard work does not translate into a victory on the scoreboard, it is not one that educators can

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[16] *See Denis J. O'Connell High Sch.*, 581 F.2d at 86 (observing that the purposes of transfer rules and anti-recruiting rules are "basically the same[:] to deter those who would pressure a student to transfer and to deter the student from succumbing to such pressures by preventing him from becoming immediately eligible to compete at his new school").

[17] *Cf. Burrows v. Ohio High Sch. Athletic Ass'n*, 891 F.2d 122, 124 (6th Cir. 1989) (upholding rule designed to "prevent unfair development of 'power squads,'" or teams that practice together year-round, by barring participation in interscholastic athletics by students who play for independent sports teams); *Alerding v. Ohio High Sch. Athletic Ass'n*, 779 F.2d 315 (6th Cir. 1985) (upholding rule limiting participation in interscholastic athletics to state residents to prevent private schools located near state border from gaining an unfair advantage by recruiting out-of-state students).

persuade students to learn if they are already convinced that hard work will never pay off. And if uncontrolled recruiting signals to students that winning is more important than participating and participating is only for the preternaturally talented, then the shy, the clumsy, and the self-doubting will stay away from sports. Unless educators can enforce the rules that maintain "competitive equity," including anti-recruiting rules, they will lose the ability to influence a large number of students on the field – some of whom they may already have difficulty reaching in the classroom.

IV. Educational Authorities Such As TSSAA Are Entitled To Particular Deference In Enforcing Rules That Lie Within Their Educational Mission.

In *Brentwood I*, this Court held that TSSAA was a state actor because public school officials "overwhelmingly perform all but the purely ministerial acts by which the Association . . . functions" and because the State Board of Education authorizes TSSAA to administer high school athletics in its stead. 531 U.S. at 300, 301. Petitioners are asking this Court to overturn its holding of *Brentwood I*. NSBA takes no position on that question. But as long as TSSAA and other public-private interscholastic athletic leagues are considered state actors because of their entwinement with state educational authorities, courts should treat them as educators as well. And as an educator, TSSAA is entitled to the great deference that federal courts traditionally allow state and local school authorities in setting education policies and priorities, a deference not accorded it by the court of appeals.

A. Under *Brentwood I*, TSSAA And Similar Bodies In Which Public Schools Participate Are Education Policymakers.

TSSAA fulfills two complementary roles. As this Court found earlier, TSSAA implements the goals of public schools with regard to high school sports, *see Brentwood I*, 531 U.S.

at 291, 299-300, and it acts in lieu of the Tennessee State Board of Education in administering interscholastic competition, *id.* at 291, 300-02. In both roles, TSSAA acts as an educator and an education policymaker. Furthermore, TSSAA oversees secondary school athletics, an activity this Court has recognized as an "integral part" of education. See *id.* at 299. Thus, TSSAA should be treated as an educator.

In coordinating interscholastic athletics, TSSAA operates well within the traditional realm of educators. This Court has previously recognized that the scope of public education is broader than what is taught in the classroom. Indeed, education includes many school-sponsored but non-curricular activities that "members of the public might reasonably perceive to bear the imprimatur of the school." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988). This Court reasoned that "[t]hese activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting," because they are "supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences." *Id.* As we have already explained, the high schools of Tennessee – and indeed, high schools across the country – find competitive sports useful as a means to teach students important skills; TSSAA, in overseeing high school athletics, acts as an educator setting policy for the students of Tennessee.

B. As An Educator, TSSAA Deserves Deference In Its Administration Of Interscholastic Athletics

This Court has long recognized that "[b]y and large, public education in our Nation is committed to the control of state and local authorities." *Goss v. Lopez*, 419 U.S. 565, 578 (1975) (internal quotations omitted). When deferring to state and local authorities in the realm of education, this Court has relied on two parallel lines of reasoning. First, principles of federalism favor local control of education. Second, unlike courts, educators have the professional qualifications

necessary to determine how best to pursue substantial educational interests.

The principle of local control over educational decisions is ingrained in our nation's history. "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process." *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974). Local control of education "affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs, and encourages 'experimentation, innovation, and a healthy competition for educational excellence.'" *Id.* at 742 (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973)). Thus local control is both "vital to continued public support of the schools" and is "of overriding importance from an educational standpoint as well." *Rodriguez*, 411 U.S. at 49 (internal quotations omitted).

This Court has also recognized that educators, not courts, have the competence to best determine educational policies and priorities. States and school officials possess "comprehensive authority" when they move to "prescribe and control conduct in the schools." *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 507 (1969). Permitting federal court challenges to this school authority would "compel[] the teachers, parents, and elected school officials to surrender control of the American public school system" to those who would sue in federal court, a result this Court has expressly disclaimed. *Bethel Sch. Dist. No. 3 v. Fraser*, 478 U.S. 675, 686 (1986) (citation omitted).

Public education acts as "an 'assimilative force' by which diverse and conflicting elements in our society are brought together on a broad but common ground." *Ambach v. Norwick*, 441 U.S. 68, 77 (1979) (citations omitted). This can be true for a wide variety of extracurricular activities

sponsored by schools. Athletic events, artistic performances, and service learning can facilitate cooperation among students from diverse backgrounds and bring together the larger community as well.

These admirable goals would be undermined if this Court were to affirm the court of appeals' approach. That court's willingness to assess for itself the importance of goals such as competitive balance is likely to produce a proliferation of lawsuits challenging the decisions of educational authorities. As this Court has recognized in its qualified immunity jurisprudence, there is a real danger that excessive litigation could "deter [officials'] willingness to execute [their] office with the decisiveness and the judgment required by the public good." *Butz v. Economou*, 438 U.S. 478, 497 (1978) (internal quotations omitted). It is for this reason that this Court, in *New Jersey v. T.L.O.*, crafted a reasonableness standard requiring that school officials simply exercise "common sense" before searching a student for drug paraphernalia so as to avoid "unduly burden[ing] the efforts of school authorities to maintain order in their schools." 469 U.S. 325, 342-43 (1985). Such deference to educational judgment ensures that educators and not litigants maintain control of public education.

Further, this Court has consistently held that federal courts are ill-suited to intervene in the day-to-day operations of public schools. For example, in *Hazelwood* this Court held that "the determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board, rather than with the federal courts." 484 U.S. at 267 (internal quotation marks omitted); *see also Fraser*, 478 U.S. at 683. These cases reflect this Court's consistent recognition that educational judgments properly rest with educational authorities.

If this Court were to turn its back on these longstanding principles to adopt the Sixth Circuit's reasoning, the consequences for public education would be severe. First,

public leagues like TSSAA might choose to exclude private schools altogether rather than face repeated First Amendment challenges to their policies – a result that could harm both public and private school students who would no longer compete against as diverse a group of other schools. Second, parents and students could try to extend the Sixth Circuit's reasoning by bringing constitutional challenges to a range of other school policies and decisions. For instance, students could challenge intra-school rules limiting participation in athletics, other extracurricular activities, or even curricular activities as violating their rights to free association or free expression. If Brentwood can challenge the terms of its voluntary contract with TSSAA, students and parents are likely to assert that the non-contractual relationship between citizens and school authorities provides even less legal protection for educational decisions.

If the Sixth Circuit's fact-sensitive intermediate scrutiny is applied in such contexts, then litigation against educational authorities will be even more protracted than it already is. The litigation will be costly even if the school boards ultimately prevail. Fear of such litigation will paralyze school authorities and hamper their ability to educate the nation's children efficiently and effectively. Moreover, because challenges to school rules will satisfy the requirements of *Monell v. Department of Social Services*, 436 U.S. 658 (1978), plaintiffs may very well obtain damages (as well as injunctive relief) even in cases where school districts acted reasonably only to be second-guessed by federal courts. This Court's jurisprudence has long recognized that educators should receive special deference in their policy decisions precisely to avoid the second-guessing and gridlock in public education that adoption of the Sixth Circuit's rule would create. Under that tradition, TSSAA's recruiting rule is entitled to deference here.

CONCLUSION

For the foregoing reasons as well as those in petitioner's brief, the judgment should be reversed.

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IN THE

Supreme Court of the United States

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION,
Petitioner,

v.

BRENTWOOD ACADEMY,
Respondent.

CORRECTED COPY

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL WOMEN'S LAW CENTER *ET AL.* IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici curiae, National Women's Law Center and 21 other organizations, are dedicated to the achievement of equality of opportunity for all students without discrimination based on gender, race, national origin, or disability. Individual descriptions of each *amicus* are set forth in Appendix A. All *amici* have a strong interest in ensuring that the Equal Protection Clause of the Fourteenth Amendment to the Constitution, which mandates that no State shall "deny to any persons within its jurisdiction the equal protection of the laws," continues to apply to state high school athletic associations and other entities whose conduct is "fairly attributable to the State." *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

Seeking to evade constitutional standards, states and state institutions may utilize a variety of means to maintain control of programs such as high school athletics while appearing to delegate authority to a separate private entity. *Brentwood Acad.* v. *Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288 (2001) ("*Brentwood I*"), is an important component of this Court's state action jurisprudence which ensures that constitutional protections will be provided when a nominally private entity engages in actions that are "fairly attributable" to the state. *Id.* at 295. This Court should reject petitioner's request that it revisit *Brentwood I*.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. In *Brentwood I*, this Court held that the Tennessee Secondary School Athletic Association ("TSSAA") acts "under color of" state law, 42 U.S.C. § 1983, and that its actions are therefore subject to constitutional scrutiny. On

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[1] No person or entity other than *amici* made a monetary contribution to the preparation or submission of this brief. Counsel of record for both parties have consented to the filing of this brief, and the letters of consent have been filed with the Clerk.

remand, the court of appeals held that TSSAA had violated the First Amendment and the Due Process Clause, and this Court granted the petition for review of that decision. TSSAA challenges the judgment that the First Amendment and Due Process Clause were violated on the merits, but also asks this Court to reconsider and overrule its 2001 decision that TSSAA is a state actor. The parties have focused on the First Amendment and Due Process questions and address the state actor question only briefly. *Amici* do not address the underlying constitutional questions but, for numerous reasons, strongly oppose TSSAA's contention that *Brentwood I* should be overruled.

First, TSSAA has utterly failed to demonstrate any "special justification" for overruling *Brentwood I* under this Court's *stare decisis* doctrine. See *Arizona* v. *Rumsey*, 467 U.S. 203, 212 (1984). TSSAA does not contend that there has been a change in either the relevant legal framework or in this Court's understanding of state action principles, undermining and thus justifying a reconsideration of *Brentwood I*. Instead, TSSAA contends that *Brentwood I* was a "significant departure" from established state action jurisprudence that has proven confusing and unworkable in the lower courts. Neither contention bears examination.

Brentwood I is wholly consistent with this Court's established case law addressing when a seemingly private entity "may fairly be said to be a state actor." *American Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U.S. 40, 50 (1999). Like the state action cases that came before it, *Brentwood I* acknowledges that the state action inquiry is necessarily highly fact dependent, and that the ultimate inquiry is always whether the actions of the private party are "fairly attributable" to the state. 531 U.S. at 295. See, *e.g.*, *Lugar*, 457 U.S. at 937 (same).

The subsidiary inquiries that this Court has established to aid lower courts in answering this fundamental question (such as the public function, nexus, symbiotic relationship, and

entwinement inquiries) are just that – aids to application of the fundamental test. Thus, far from being an "abrupt departure," *Brentwood I* mandates the same factual inquiry that this Court has always conducted, poses the same central question that this Court has always asked, and seeks to serve the same purposes that this Court has always sought to further in applying the Constitution. This result reached in *Brentwood I* is the logical outcome of this Court's precedent holding that when public entities control a nominally private entity, the latter's actions are fairly attributable to the state. See, *e.g.*, *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374 (1995). This point is illustrated by the fact that *prior* to the Sixth Circuit's decision that underlay *Brentwood I*, every court of appeals to consider the question had found state athletic associations to be acting under color of state law, and that dicta from this Court strongly supported that outcome. See *NCAA* v. *Tarkanian*, 488 U.S. 179, 193 n.13 (1988).

Second, *Brentwood I* has neither confused the lower courts nor set an "unworkable" standard. To the contrary, lower courts in every circuit routinely apply *Brentwood I* to assess the presence of state action without expressing any confusion or evincing any difficulty in doing so. The dicta that TSSAA and its *amicus*, the National Collegiate Athletic Association ("NCAA"), cite to demonstrate confusion and unworkability fail to do so. When read in context, they say nothing more than that this Court has settled on a fact-intensive inquiry for the state action test; that this Court has suggested a number of different ways that private parties may be deemed to act under color of state law; and therefore that there is no bright-line test. Instead, courts must carefully consider all the facts in light of the Court's cases and decide whether the private party's actions are fairly attributable to the state. This inquiry may be time consuming and is focused on facts, but it is neither confusing nor unworkable.

The decision in *Brentwood I* is correct, and the legal test for state action is workable. Some legal standards inherently

require fact-intensive analysis, and federal district courts are fully capable of applying this Court's standard and making the required assessment. This is no different than numerous other areas of federal law, such as the admission of expert testimony or assessment of entitlement to preliminary relief. See *Daubert* v. *Merrell Dow Pharms., Inc.*, 509 U.S, 579 (1993); *eBay* v. *Merck Exch., L.L.C.*, 126 S. Ct. 1837 (2006).

The Court's conclusion that TSSAA is a state actor fits comfortably within this Court's state action precedent, prescribes a workable factual inquiry with a clear and understandable ultimate test ("fairly attributable"), is consistent with the prior results in the courts of appeals, and is correct. It should not be overruled.

2. Recognizing that state athletic associations are state actors is important to ensuring the guarantee of equal protection because these associations govern nearly every aspect of interscholastic athletics throughout their states. This outcome has not unduly burdened state athletic associations. Indeed, the state athletic associations did not address the state actor question in their *amicus* briefs. See Brief *Amicus Curiae* of Nat'l Fed. of State High Sch. Ath. Ass'ns; Brief *Amici Curiae* of the Arizona Interscholastic Ass'n.

Participating in athletics has far-reaching educational, physical, psychological and sociological benefits for all high school students, but particularly for female and minority students. Athletic participation expands academic opportunities and promotes academic achievement in addition to offering important life lessons and skills. Further, sports participation provides specific and significant physical and mental health benefits to female and minority students. Unfortunately, the promise of equal protection has yet to be fully realized with respect to female and minority students' opportunities to participate in athletics and play on a level field, and the application of the Equal Protection Clause to high school athletic associations is critical to progress towards equality.

Thus far, states have been unable to insulate themselves from the constitutional guarantee of equal protection by creating the appearance of distance between the state and the athletic associations. By finding that TSSAA is a state actor, *Brentwood I* simply continued on the pathway already marked by this Court's state action decisions. There is no reason, let alone a special justification, to overrule *Brentwood I*.

ARGUMENT

I. *BRENTWOOD I* IS CORRECT AND SHOULD NOT BE OVERRULED.

The doctrine of *stare decisis*, the rule of judicial adherence to precedents, "is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991). And, "[a]lthough adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of stare decisis demands special justification." *Rumsey*, 467 U.S. 212. See also *United States* v. *Dixon*, 509 U.S. 688, 711 (1993) ("[w]e do not lightly reconsider a precedent").

There is no contention here that this Court's state action cases following 2001 have undermined *Brentwood I* or that the Court has come to see the facts and circumstances presented in *Brentwood I* differently in light of the passage of time. Cf. *Agostini* v. *Felton*, 521 U.S. 203, 235-40 (1997) (overruling a decision because of a significant change in the Court's Establishment Clause law since the case at issue was decided). Instead, TSSAA and its *amicus* claim to have two types of the necessary "special justification" for overruling *Brentwood I*.

First, they say that *Brentwood I* constitutes a "significant departure" from established state actor jurisprudence. See

Adarand Constructors, Inc. v. *Pena*, 515 U.S. 200, 231-32 (1995) (overruling decision as "a significant departure" from longstanding precedent); *Dixon*, 509 U.S. at 704-12 (overruling a decision found to be "wholly inconsistent with earlier Supreme Court precedent").

Second, they contend that the Court is not "'constrained to follow'" *Brentwood I* because it is "unworkable." See *Payne*, 501 U.S. at 827-30 (overruling decisions because they "have defied consistent application by the lower courts"); *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 854-61 (1992) (noting "practical workability" inquiry).

As we now show, both contentions lack merit.

A. *Brentwood I* Incorporates And Adopts Past State Actor Decisions.

TSSAA first erroneously argues that *Brentwood I* was a break from this Court's precedents and should therefore be reconsidered by the Court. See Pet. Br. 46-50. A fair reading of *Brentwood I* reveals that it in no way departs from prior Supreme Court cases, let alone abruptly does so. *Brentwood I* is simply an explication of and extrapolation from the Court's extant state actor jurisprudence. The fundamental inquiry to determine whether a private party is acting under color of state law is whether that party's actions are "fairly attributable to the State." See *Lugar*, 457 U.S. at 937; *Blum* v. *Yeretsky*, 457 U.S. 991, 1004 (1982). *Brentwood I* does not depart from this test: It *applies* it. *Brentwood I*, 531 U.S. at 295.

Similarly, as in past cases, the Court acknowledged and adhered to the highly fact-bound nature of the state actor inquiry to determine whether "an ostensibly private organization or individual is to be treated . . . as . . . a State." *Brentwood I*, 531 U.S. at 295. See, *e.g.*, *Lugar*, 457 U.S. at 939 (characterizing the state actor test as a "necessarily fact-bound inquiry"). The Court stated "[o]ur cases have identified a host of facts that can bear on the fairness of" attributing the actions of a private entity to the State.

Brentwood I, 531 U.S. at 296 (listing the State's exercise of coercive power, the State's encouragement of certain activity, the private party's willful participation in joint action with the State, the State's control of a private party, the State's delegation of a public function to a private party, and the State's entwinement with a private party's management and control). As the Court summarized, "[a]midst such variety, examples may be the best teachers." *Id.*

The individual Court cases addressing the state actor question, and the particularized inquiries that have grown up to aid in applying the "fairly attributable" standard, are simply tools for the lower courts to utilize in order to guide their inquiry into the facts and their application of the "fairly attributable" test. The Court's entwinement analysis in *Brentwood I* thus fits comfortably within the established state actor precedent. Indeed, in describing the entwinement examples, *Brentwood I* cites *Evans* v. *Newton*, 382 U.S. 296 (1966), which uses the entwinement formulation. See 531 U.S. at 296, 301 (a challenged action may be state action "when it is 'entwined with governmental policies' or when government is 'entwined in [its] management or control'"). TSSAA disagrees that its actions are fairly attributable to the State, but the *Brentwood I* analysis is built on and consistent with this Court's established approach and authority.[2]

Numerous lower courts have recognized that in the arena of state action, "'examples may be the best teachers,' providing th[e] [lower] court[s] with guidance with which to address

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[2] In arguing that *Brentwood I*'s entwinement inquiry is a virtually limitless expansion of the state action doctrine, making any assertion that a private party is a state actor reasonable and calling into question the *Tarkanian* Court's decision that the NCAA is not a state actor, the NCAA (at 17-19) cites *Cohane* v. *NCAA ex rel. Brand*, 2007 WL 247710 (2d Cir. Jan. 25, 2007). This citation is misleading. In fact, the entwinement approach is not even at issue in *Cohane*, which remands for further discovery solely on the question whether "the NCAA was a 'willful participant' in joint activity with the State." *Id.* at *2.

this question." *Village of Bensenville* v. *FAA*, 457 F.3d 52, 65 n.5 (D.C. Cir. 2006) (citation omitted) (quoting *Brentwood I*, 531 U.S. at 296). See also *Conner* v. *Salina Reg'l Health Ctr., Inc.*, 56 F. App'x 898, 902 (10th Cir. 2003) ("the Supreme Court has developed, and we have utilized, a variety of approaches to assist in determining if state action exists"); *Jenkins* v. *Area Coop. Educ. Servs.*, 248 F. Supp. 2d 117, 123 (D. Conn. 2003) (*Brentwood I* does not set forth a bright-line test for state action but rather illuminates the factors that should be considered in resolving the issue), *modified on other grounds*, 2004 WL 413267 (D. Conn. Feb. 25, 2004). As one district court explained after describing the different approaches to state action summarized in *Brentwood I*:

> [w]hile described as "tests," there is some reason to believe these are but factors or circumstances to consider. Recently, the Supreme Court, in *Brentwood Academy*, noted that whether an ostensibly private actor could fairly be considered a state actor is a matter of judgment, without rigid criteria or guidance. This notion is *not a departure* from prior Supreme Court cases . . . . [*Keeling* v. *Schaefer*, 181 F. Supp. 2d 1206, 1228 (D. Kan. 2001) (citation omitted) (emphasis added).]

Indeed, many lower courts treat *Brentwood I* as simply clarifying this Court's pre-existing analysis for finding state action by an otherwise private entity. See *Tool Box* v. *Ogden City Corp.*, 316 F.3d 1167, 1176 (10th Cir. 2003), *vacated on other grounds on reh'g en banc*, 355 F.3d 1236 (10th Cir. 2004); *Marvin* v. *North Cent. Iowa Mental Health Ctr. Inc.*, 2004 WL 2075469, at *4 (N.D. Iowa Sept. 17, 2004) ("*Brentwood* . . . clarified the test for 'state action.'").

The fundamental approach that *Brentwood I* takes with respect to high school athletic associations thus reflects the approach taken in previous cases addressing the question whether the actions of a nominally private entity are fairly attributable to the state. For example, in *Pennsylvania* v. *Board of Directors of City Trusts*, 353 U.S. 230 (1957) (per

curiam), this Court held that a college that was built and maintained by a private trust, but was operated and controlled by a board of state appointees, was a state actor, and therefore that its refusal to admit black students was "discrimination by the State." *Id.* at 231.

Likewise, in *Evans*, 382 U.S. at 301, this Court held that private trustees who held title to and controlled a park for whites only were subject to the Fourteenth Amendment. This Court stated that the park had been controlled by the city for years and served a public purpose (providing recreational opportunities to the community). Therefore, the Court found that the park did not lose its public nature when private trustees took over its operation, stating that "[i]f the municipality remains entwined in the management or control of the park, it remains subject to the restraints of the Fourteenth Amendment." *Id.*

Similarly, in *Lebron*, this Court decided that Amtrak, an operator of passenger trains organized under federal law to pursue a public objective "under the direction and control of federal governmental appointees," 513 U.S. at 398, was a state actor. Critical to the Court was the state's retention of authority to appoint a majority of the private corporation's directors. *Id.* at 400.

In light of this precedent, it is not surprising that even before *Brentwood I*, this Court, in the course of finding that the NCAA is not a state actor, had in dicta indicated that state high school athletic associations are. See *Tarkanian*, 488 U.S. at 193 n.13 ("[t]he situation would, of course, be different if the membership consisted entirely of institutions located within the same State, many of them public institutions created by the same sovereign"). The Court cited with approval two courts of appeals decisions holding that high school athletic associations composed primarily of public schools are state actors. *Id.* (citing *Clark* v. *Arizona Interscholastic Ass'n*, 695 F.2d 1126 (9th Cir. 1982) and *Louisiana High Sch. Athletic Ass'n* v. *St. Augustine High*

Sch., 396 F.2d 224 (5th Cir. 1968)). Indeed, all courts of appeals to consider the question other than the Sixth Circuit reached that conclusion. See also *Griffin High Sch.* v. *Illinois High Sch. Ass'n*, 822 F.2d 671, 674 (7th Cir. 1987); *In re United States ex rel. Mo. State High Sch. Activities Ass'n*, 682 F.2d 147, 151 (8th Cir. 1982); *Moreland* v. *Western Pa. Interscholastic Athletic League*, 572 F.2d 121, 125 (3rd Cir. 1978); *Oklahoma High Sch. Athletic Ass'n* v. *Bray*, 321 F.2d 269, 273 (10th Cir. 1963). As this authority reveals, the contention of *amicus* NCAA that *Brentwood I* left state athletic associations confused (Br. 2) simply makes no sense. After these decisions and *Tarkanian*, state athletic associations were fully on notice that they were state actors.

Finally, not all commentators critical of *Brentwood I* cited in the NCAA's brief (at 16) consider the case an abrupt departure from this Court's state actor decisions. For example, one author states that it "would surely grossly exaggerate the significance of *Brentwood* to regard it as a watershed for the Court's more moderate members, or as a turning point in state action jurisprudence." Alan R. Madry, *Statewide School Athletic Associations and Constitutional Liability; Brentwood Academy* v. *Tennessee Secondary School Athletic Association*, 12 Marq. Sports L. Rev. 365, 394 (2001). Indeed, he opines that the "notion of entwinement that Justice Souter introduced in *Brentwood* is also *easily assimilated* into the Rehnquist paradigms as yet another way in which the state might be causally responsible for the acts of a private party." *Id.* (emphasis added).

In sum, *Brentwood I* is a straightforward articulation and application of pre-existing state action analysis. As such, *Brentwood I* does not constitute a departure – let alone a significant one – from prior Supreme Court state actor jurisprudence.

B. *Brentwood I*'s Standard Is Workable.

TSSAA next claims that *Brentwood I* is unworkable. It argues that "[l]ower courts have been confused by *Brentwood I*'s new 'entwinement' doctrine, describing it as 'labyrinthine,' 'nebulous,' 'vague,' and a 'freewheeling *gestalt* analysis.'" Pet. 28 (citations omitted); see also Pet. Br. 46-50. Indeed, TSSAA claims that lower courts are confused about how many tests there are. TSSAA is wrong again. Even the few cases TSSAA cites do not support its claim of unworkability, and the vast bulk of cases applying *Brentwood I* do so in a workmanlike fashion, examining the facts presented and sometimes finding action under color of state law and sometimes rejecting that characterization. TSSAA's complaint is no more than that this Court has set forth a general test that requires a highly detailed factual inquiry.

First, TSSAA cites six cases in support of the contention that lower courts have been confused by the entwinement analysis of *Brentwood I*. In four of these six cases, the critical dicta is *not* addressed to *Brentwood I*'s entwinement inquiry. Instead, the dicta describe the state action doctrine in general terms, and in particular refer to the highly fact-specific nature of the analysis. For example, in *Leshko* v. *Servis*, 423 F.3d 337 (3d Cir. 2005), the court does not express confusion regarding *Brentwood I*'s entwinement analysis, but rather notes the complexity of the state action inquiry. The court then discusses the tests applied to private persons in determining the presence of state action and concludes no state action is present. This is the full sentence in which the quote selected by TSSAA appears: "We weave our way in this appeal through the Supreme Court's *labyrinthine* state action jurisprudence." *Id.* at 338 (emphasis added to portion quoted by TSSAA). This makes clear that the court was referring to the complexity of the jurisprudence generally, and not to the entwinement approach.

Likewise in *Tancredi* v. *Metropolitan Life Insurance Co.*, 378 F.3d 220 (2d Cir. 2004), the court is referring to the state

action doctrine generally when it states that *Brentwood I* "illustrates the *nebulous* character of the state action test." *Id.* at 230 (emphasis added). The court does discuss the entwinement analysis in *Brentwood I*, but expresses no confusion about its application or import.[3]

The other two cases cited by TSSAA also do not express either confusion about *Brentwood I* or any inability to apply the decision. Indeed, contrary to NCAA's view that *Brentwood I* portends an "unrestrained expansion" of the state action doctrine (Br. 18), both courts ultimately conclude that the private party involved is *not* a state actor under *Brentwood I*. In *Kirtley* v. *Rainey*, 326 F.3d 1088 (9th Cir. 2003), the court states that the "nexus test" is "[a]rguably the most *vague* of the four approaches." *Id.* at 1094 (emphasis added to portion quoted by TSSAA). Of course, the nexus test preceded the entwinement analysis of *Brentwood I*. See *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974) (reciting nexus inquiry). And in *Gross* v. *Fond Du Lac County Agricultural Society, Inc.*, 2005 U.S. Dist. LEXIS 19537 (E.D. Wis. Sept. 6, 2005), the court stated that *Brentwood I* "suggests a liberal and *freewheeling gestalt analysis,* eschewing bright lines for 'normative judgments' and counseling against 'rigid simplicity' in favor of fairness." *Id.* at *23 (emphasis added to portion quoted by TSSAA). Of course, the fact intensity of the state actor analysis preceded *Brentwood I* and is well established. See *supra* at 6-8. And, individual inquiries such as the public function, nexus and

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[3] *See also Crissman* v. *Dover Downs Entm't, Inc.*, 289 F.3d 231, 233 (3d Cir. 2002) (en banc) (court is addressing state action generally, not entwinement, when it notes that "*little is straightforward* in determining whether a private actor has acted 'under color of state law'") (emphasis added to portion quoted by TSSAA); *Willis* v. *Town of Marshall*, 293 F. Supp. 2d 608, 615 (W.D.N.C. 2003) (court is referring to all state action precedent when it states that "precedent regarding questions of state action is *anything but clear and consistent.*") (emphasis added to portion quoted by TSSAA).

entwinement inquiries, guide the lower court's discretion rather than increasing it. In any event, eschewing a bright line for fairness sounds like praise, rather than a cry of unworkability.

The state action inquiry always has been fact intensive, and criticism of it for that reason is nothing new.[4] This Court, however, has determined – and not for the first time in *Brentwood I* – that in this area, bright-line rules are not appropriate, and that the facts must be examined. As this Court has said in other contexts, "[w]e like [our legal standards] to be 'clear and unequivocal,' but only when they guide sensibly." *McNeil* v. *Wisconsin*, 501 U.S. 171, 182 (1991) (citation omitted). The lower courts are not confused by this holding.

Second, TSSAA argues that "[l]ower courts are even confused about how many different state action tests there are." Pet. 28. Again, the three decisions relied on by TSSAA fail to demonstrate any such confusion. Some courts focus on the list of approaches recited in *Brentwood I*, 531 U.S. at 296, while other courts group the approaches into more general categories. *Wang* v. *Blue Cross Blue Shield Ass'n*, 55 F. App'x 802 (9th Cir. 2003), is an example of the former phenomenon. See *id.* at 803. The court expresses no confusion regarding the state action inquiry; it conducts its analysis and concludes that no state action exists "under any relevant theories." *Id.* *Sabeta* v. *Baptist Hosp. of Miami, Inc.*, 410 F. Supp. 2d 1224 (S.D. Fla. 2005), is an example of the grouping approach. See *id.* at 1243-44 (grouping nexus and joint action under a "position of interdependence" approach). Again, the court simply concludes that "[u]nder

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[4] *See* Laurence H. Tribe, *American Constitutional Law* § 18-1, at 1690 (2d ed. 1988) (stating prior to *Brentwood I* that the "Court itself has acknowledged the stubborn individuality of the state action cases" and that "viewed doctrinally, the state action cases are 'a conceptual disaster area'").

any of these tests, [the] private behavior cannot be construed as state action." *Id.* at 1244. Finally, in *Keeling* v. *Schaefer*, 181 F. Supp. 2d at 1227-28, the court again simply groups the different approaches into more general categories. Evincing its full understanding of the state action test, the court correctly noted that "[w]hile described as 'tests,' there is some reason to believe these are but factors or circumstances to consider." *Id.* at 1228.

A comprehensive, rather than selective, examination of whether the lower courts are confused about applying *Brentwood I* reveals that they are not. Set forth in the note attached to this paragraph are cases from virtually all federal circuits decided after *Brentwood I* and evincing no confusion.[5]

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[5] **D.C. Circuit:** *Williams* v. *United States*, 396 F.3d 412 (D.C. Cir. 2005); *Bates* v. *Northwestern Human Servs., Inc.*, 466 F. Supp. 2d 69 (D.D.C. 2006).

First Circuit: *Logiodice* v. *Trustees of Me. Cent. Inst.*, 296 F.3d 22 (1st Cir. 2002); *Tomaiolo* v. *Mallinoff*, 281 F.3d 1 (1st Cir. 2002); *McGuire* v. *Reilly*, 271 F. Supp. 2d 335 (D. Mass. 2003), *aff'd*, 386 F.3d 45 (1st Cir. 2004).

Second Circuit: *Horvath* v. *Westport Library Ass'n*, 362 F.3d 147 (2d Cir. 2004); *Hamlin ex rel. Hamlin* v. *City of Peekskill Bd. of Educ.*, 377 F. Supp. 2d 379 (S.D.N.Y. 2005); *Doe* v. *Harrison, M.D.*, 254 F. Supp. 2d 338 (S.D.N.Y. 2003); *Curto* v. *Smith*, 248 F. Supp. 2d 132 (N.D.N.Y. 2003), *aff'd*, 93 F. App'x 332 (2d Cir. 2004) (table); *St. Ledger* v. *Area Coop. Educ. Servs.*, 228 F. Supp. 2d 66 (D. Conn. 2002).

Third Circuit: *Benn* v. *Universal Health Sys., Inc.*, 371 F.3d 165 (3d Cir. 2004).

Fourth Circuit: *Rossignol* v. *Voorhaar*, 316 F.3d 516 (4th Cir. 2003); *Mentavlos* v. *Anderson*, 249 F.3d 301 (4th Cir. 2001); *Stanley* v. *Gray*, 2007 WL 445366 (W.D. Va. Feb. 11, 2007); *Wall* v. *South Carolina*, 2006 WL 2443341 (D.S.C. Aug. 22, 2006).

Fifth Circuit: *Morris* v. *Dillard Dep't Stores, Inc.*, 277 F.3d 743 (5th Cir. 2001); *Liu* v. *SMU Sch. of Law*, 2003 WL 21435738 (N.D. Tex. June 16, 2003).

Moreover, as was true before *Brentwood I*, numerous lower courts have recognized that the state action inquiry is necessarily fact bound, flexible and highly circumstantial after *Brentwood I*. See, *e.g.*, *Tool Box*, 316 F.3d at 1177 (noting "the fact–intensive character of a state action determination"); *Conner*, 56 F. App'x at 902 (requiring a "fairly flexible approach in determining if state action exists"); *Crissman*, 289 F.3d at 234-43 ("the facts are crucial" in conducting a state action determination); *Richards* v. *City of Lowell*, 2007 WL 293583, at *18 (D. Mass. Jan. 31, 2007) (the "inquiry, under any of these theories, is necessarily fact-intensive, and the ultimate conclusions regarding state action

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Sixth Circuit: *Communities for Equity* v. *Michigan High Sch. Athletic Ass'n*, 459 F.3d 676 (6th Cir. 2006), *petition for cert. filed*, 75 U.S.L.W. 3403 (U.S. Jan. 29, 2007) (No. 06-1038); *McCarthy* v. *Middle Tenn. Elec. Membership Corp.*, 466 F.3d 399 (6th Cir. 2006); *Hughes* v. *Region VII Area Agency on Aging*, 423 F. Supp. 2d 708 (E.D. Mich. 2006); *Daniels* v. *Retired Senior Volunteer Program*, 2006 WL 783438 (S.D. Ohio Mar. 27, 2006).

Seventh Circuit: *Mitchell* v. *St. Elizabeth Hosp.*, 119 F. App'x 1 (7th Cir. 2004); *Gross*, 2005 U.S. Dist. LEXIS 19537; *Framsted* v. *Municipal Ambulance Serv., Inc.*, 347 F. Supp. 2d 638 (W.D. Wis. 2004).

Eighth Circuit: *Wickersham* v. *City of Columbia*, 371 F. Supp. 2d 1061 (W.D. Mo. 2005); *Hauschild* v. *Nielsen*, 325 F. Supp. 2d 995 (D. Neb. 2004); *Marvin*, 2004 WL 2075469.

Ninth Circuit: *Single Moms, Inc.* v. *Montana Power Co.*, 331 F.3d 743 (9th Cir. 2003); *Wang*, 55 F. App'x 802.

Tenth Circuit: *Tool Box*, 316 F.3d 1167; *Conner*, 56 F. App'x 898; *Johnson* v. *Rodrigues (Orozco)*, 293 F.3d 1196 (10th Cir. 2002); *Jornigan* v. *New Mexico Mut. Cas. Co.*, 2004 WL 3426437 (D.N.M. Apr. 19, 2004); *Keeling*, 181 F. Supp. 2d 1206.

Eleventh Circuit: *Loren* v. *Sasser*, 309 F. 3d 1296 (11th Cir. 2002) (per curiam); *Bevan* v. *Scott*, 2005 WL 2219433 (M.D. Fla. Sept. 13, 2005).

must be based on the particular facts and circumstances set forth in the record").[6]

The fact that an inquiry is flexible and requires a detailed factual analysis does not mean it is unworkable. District courts routinely and successfully conduct fact-bound inquiries in deciding mixed questions of law and fact. See, *e.g.*, *eBay*, 126 S.Ct. 1837; *Daubert*, 509 U.S. 579.[7] This Court has mandated such a detailed inquiry in the state action arena because different factual situations present different questions for courts seeking to determine whether a private party's actions can be "fairly attributed" to the state.

In sum, *Brentwood I* has neither confused the lower courts nor proven unworkable. Instead, *Brentwood I* is routinely applied by the federal courts in almost every circuit in conducting and resolving state action determinations. In reality, TSSAA is making a naked appeal to this Court to take the exceptional step of overruling its 2001 decision without providing the requisite special justification. TSSAA's disagreement with the outcome of this Court's detailed factual analysis is no basis for *Brentwood I's* reconsideration.

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[6] *See also Stanley*, 2007 WL 445366, at *5 ("'no one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient'"); *Wall*, 2006 WL 2443341, at *7 (stating that the "determination is made considering the totality of the circumstances"); *Bevan*, 2005 WL 2219433, at *5 ("Supreme Court's prior decisions have 'identified a host of facts that can bear on the fairness of'" attributing seemingly private behavior to the State); *Curto*, 248 F. Supp. 2d at 138 n.9 ("*Brentwood* adopted a fact-sensitive, case-by-case analysis"); *Jenkins*, 248 F Supp. 2d at 123 (*Brentwood I* does not set forth a bright-line test for state action but illuminates the factors that should be considered in resolving the issue).

[7] *See also Richards* v. *Wisconsin*, 520 U.S. 385, 394 (1997) (instructing lower courts to conduct a fact-specific inquiry when determining whether a no-knock entry may be warranted and rejecting the pronouncement of any per se rule).

C. *Brentwood I* Is Correct.

As explained above, *Brentwood I*'s analysis is wholly consistent with this Court's state action precedent, and the conclusion it reached was foreshadowed by *Tarkanian* and the virtually unanimous holdings of the courts of appeals. Our demonstration that *Brentwood I* was not an abrupt departure from precedent thus also demonstrates that it was correctly decided.

Specifically, the Court held that the "nominally private character of the [TSSAA] is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings, and [that] there is no substantial reason to claim unfairness in applying constitutional standards to it." *Brentwood I*, 531 U.S. at 298. The Court concluded that the TSSAA "ought to be charged with a public character and judged by constitutional standards" primarily because (i) 84% of TSSAA's membership is composed of public schools "represented by their officials acting in their official capacity to provide an integral element of secondary public schooling;" (ii) State Board members were assigned "ex officio to serve as members of the board of control and legislative council [of TSSAA];" and (iii) "the Association's ministerial employees [were] treated as state employees to the extent of being eligible for membership in the state retirement system." *Id.* at 299-302. As the Court held, entwinement to the pervasive degree it existed between TSSAA and the State requires a conclusion of state action. *Id.* at 302.

Moreover, treating state athletic associations as state actors in this factual context furthers the purposes of the state action requirement. In defining an area of state responsibility, this Court seeks to "preserve[] an area of individual freedom," and to "avoid[] imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed." *Lugar*, 457 U.S. at 936. But when, as here, public schools are a voting majority of the athletic association and control the elections to the association's governing board,

treating the association as a state actor does not invade an area of individual freedom. And, where, as here, state officials effectively make the association's decisions, it is fair to attribute those decisions to the State. *Brentwood I*'s holding was correct and should stand.

II. RECOGNIZING STATE ATHLETIC ASSOCIATIONS AS STATE ACTORS IS CRITICAL TO ENSURING EQUAL PROTECTION OF THE LAWS.

A. High School Athletic Associations, As State Actors, Must Not Deny Equal Protection.

All public schools engage in state action within the meaning of § 1983 and the Fourteenth Amendment. Public school rules governing participation in interscholastic high school athletics are subject to challenge under the Fourteenth Amendment. Under *Brentwood I*, public schools cannot avoid their constitutional obligations by agreeing that a state high school athletic association will make all the rules, even if that association includes some private schools. This makes legal, logical and common sense.

The Equal Protection Clause of the Fourteenth Amendment to the Constitution mandates that "no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). This Court's state action precedent, including *Brentwood I*, ensures that opportunities to participate in interscholastic athletics are provided equally without regard to sex, race or ethnicity. As set forth *infra*, equal opportunity to participate in athletics is critically important to female and minority students due to the far-reaching educational, sociological, physiological and psychological benefits that result from sports participation.

As this Court stated in *Brentwood I*, interscholastic athletics play an integral part in secondary public schooling. See 531

U.S. at 299-300. The policies and practices adopted by state boards of education and public schools to govern interscholastic athletic programs must comply with the Equal Protection Clause. *E.g.*, *Brenden* v. *Independent Sch. Dist. 742*, 477 F.2d 1292 (8th Cir. 1973) (finding that the school could not prohibit girls from playing on boys' tennis and cross country teams solely on basis of sex).

In order to promote coordinated and workable systems of state-wide interscholastic athletics, states typically designate athletic associations to set contest rules, determine eligibility restrictions, and promulgate uniform policies and practices that govern nearly every aspect of interscholastic athletics throughout the states. States may not insulate themselves from their non-discrimination obligations by formally separating themselves from state athletic associations while nonetheless maintaining control.[8] TSSAA contends that "subjecting athletic associations to constitutional litigation

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[8] Students may also challenge certain discriminatory practices in interscholastic athletics of covered institutions pursuant to statutory rights contained in Title IX of the Education Amendments of 1972 ("Title IX"), 20 U.S.C. § 1681 *et seq.*; Title VI of the Civil Rights Act of 1964 ("Title VI"), 42 U.S.C. § 2000d *et seq.*; and Section 504 of the Rehabilitation Act of 1973 ("Section 504"), 29 U.S.C. § 794 *et seq.* These statutory non-discrimination mandates do not supplant those in the Equal Protection Clause. In fact, these statutory rights and Constitutional rights differ in certain respects. For example, Title IX regulations explicitly exempt "contact sports" from certain non-discrimination requirements. Thus, a public school would not be forced to permit a girl to try out for the boys' basketball team under Title IX, even if the school fields no such team for girls. *See* 34 C.F.R. § 106.41(b). The female basketball player, however, would be able to pursue a discrimination claim under the Equal Protection Clause. By way of further example, in *Mississippi University for Women* v. *Hogan*, 458 U.S. 718, 732-33 (1982), this Court held that the University's women-only admission policy violated the Equal Protection Clause, even though the same claim was not allowed under Title IX which explicitly exempts schools that "traditionally and continually from [their] establishment [have] had a policy of admitting only students of one sex." 20 U.S.C. § 1681(a)(5).

will do little good and plenty of harm" because these associations cannot afford expensive litigation and such litigation may cause the end of "voluntary public-private interscholastic athletic competition" in the United States. Pet. Br. 19-20, 46-50. But state athletic associations have been subject to constitutional constraints for years without this alleged adverse consequence. And, as noted, the *amicus* briefs filed on their behalf do not address the state action issue.

Numerous courts have recognized the importance of ensuring that female and minority athletes receive an equal opportunity to participate in athletics by applying the Equal Protection Clause to state athletic associations. In *Brenden*, 477 F.2d at 1302-03, two Minnesota high school girls challenged as a violation of the Equal Protection Clause the state athletic association's rule prohibiting girls from participating on the boys' tennis and cross-country skiing and running teams, while the association's member schools provided no such teams for girls. The Eighth Circuit held that denying girls an opportunity to participate on a school non-contact sports team solely on the basis of sex was a denial of equal protection. *Id.* In *Louisiana High School Athletic Ass'n v. St. Augustine High School*, 396 F.2d 224, 226-29 (5th Cir. 1968), African-American high school students challenged the state athletic association's denial of membership to a high school whose student body was completely African-American. The Fifth Circuit held that the athletic association violated the students' rights to equal protection by denying membership to a school because of the racial composition of its student body. *Id.*

Continuing to hold states accountable for the rules by which they govern interscholastic athletics is essential. As discussed below, sports participation is simply too important to the educational, physical, psychological and sociological well being of the nation's children and young adults to allow states to use the device of nominally independent athletic

associations to deny equality of opportunity to female and minority students.

B. Participating In Athletics Has Far-Reaching Benefits.

Sports participation benefits all high school students, but female and minority students who participate receive especially substantial results.

In 1997, the President's Council on Physical Fitness and Sport released a report on girls' involvement in physical activity and sports. The report confirmed that sports and physical activities are highly beneficial for girls, offering a wide range of educational, sociological, physiological, and psychological benefits. See The President's Council on Physical Fitness & Sports, *Physical Activity & Sports in the Lives of Girls* xiv-xv (Spring 1997) (hereinafter "*President's Council Report*"). Sports participation confers many of the same benefits on all minority students. *See* The Women's Sports Found., *Minorities in Sports: The Effect of Varsity Sports Participation on the Social, Educational and Career Mobility of Minority Students* 4-5 (Aug. 15, 1989) (hereinafter "*Minorities in Sports*").

First, athletic participation expands academic opportunities and promotes academic achievement by providing boys and girls from diverse socioeconomic, racial, and ethnic backgrounds measurable positive educational impacts, including improvements in self-concept, higher educational aspirations in the senior year, improved school attendance, increased math and science enrollment, more time spent on homework, and higher enrollment in honors courses. See H.W. Marsh, *The Effects of Participation in Sport During the Last Two Years of High School*, 10 Soc. Sport J. 18 (1993). Studies show that student athletes generally have higher grade point averages, better attendance records, and fewer disciplinary problems. See Nat'l Fed'n of State High Sch. Ass'ns, *The Case for High School Activities* (2004)

(hereinafter "*Case for High School Activities*") *available at* http://www.nfhs.org/web/2004/01/the_case_for_high_school_activities.aspx. On average, female athletes fare better academically than their non-athletic counterparts. See *President's Council Report* at xxiii. Young women who participate in sports have higher grades, higher scores on standardized tests, and are more likely to graduate from high school and college than non-athletes. See *id.*; NCAA, *2006 NCAA Graduation Rates Report* (2006), *available at* http://web1.ncaa.org/app_data/instAggr2006/1_0.pdf (NCAA graduation rates for women athletes remain high – 71% compared to 63% for the Division I female student body).

Athletic participation yields similar benefits for Black and Hispanic students. Minority athletes receive higher grades, are less likely to drop out, score higher on standardized tests, and aspire to hold leadership positions in their communities in greater percentages than their non-athletic counterparts. See *Minorities in Sports* at 4-5; Carol Herwig, *Report Stresses Role of Academics; High School Athletes: Winners On, Off Field,* USA Today, Aug. 16, 1989, at 8D (citing *Minorities in Sports*) (hereinafter "*Report Stresses Role of Academics*"); see also *The Case for High School Activities* (finding, in a state-wide, three-year study by the N.C. High School Athletic Association, that athletes had higher grade point averages, lower dropout rates, and higher high school graduation rates, than their non-athletic peers); Richard E. Lapchick, Univ. of Cent. Fla.'s Inst. for Diversity & Ethics in Sports, *Keeping Score When it Counts: Graduation Rates and Diversity in Campus Leadership for the 2004 Women's Sweet 16 Teams,* (Mar. 2004) (female athletes in the national basketball tournament had exceedingly high graduation rates). Similarly, Hispanic female athletes, especially from rural schools, are more likely than non-athletes not only to improve their academic standing while in high school, but also to graduate and to attend college following high school. *Minorities in Sports* at 14.

Second, sports offer students lifelong lessons. Playing high school sports is a predictor of later success in life. See *The Case for High School Activities*; see also Mass. Mut. Fin. Group, *New Nationwide Research Finds: Successful Women Business Executives Don't Just Talk a Good Game . . . They Played One* (2002), *available at* http://www.massmutual.com/mmfg/pdf/boardroom.pdf (more than four out of five executive businesswomen (81%) played sports growing up – and the vast majority reported that the lessons they learned on the playing field contributed to their success in business). Female and minority athletes are more likely to aspire to hold leadership positions later in life than non-athletes. See *Minorities in Sports* at 4; *Report Stresses Role of Academics*. In addition, female athletes develop a range of skills through participation in athletics, all of which are crucial to success in employment and adult life generally. Participation in interscholastic athletics offers young women "an opportunity to e[val]uate leadership skills, learn teamwork, build self-confidence, and perfect self-discipline." *Cohen* v. *Brown Univ.*, 991 F.2d 888, 891 (1st Cir. 1993).

Third, regular and rigorous physical exercise provides enormous physical and mental health benefits to women and minorities. Sports participation decreases a young woman's chance of developing heart disease, osteoporosis, and other health related problems. See The Women's Sports Found., *Her Life Depends On It: Sport, Physical Activity and the Health and Well-Being of American Girls* 8-12 (2004), *available at* http://www.womenssportsfoundation.org/binary-data/WSF_Article/pdf_file/990.pdf (hereinafter "*Her Life Depends On It*") (a comprehensive survey of scientific research on girls' health, sports participation, and physical activity); Donna A. Lopiano, *Testimony Before the U.S. Subcomm. on Consumer Affairs, Foreign Commerce and Tourism 3* (Oct. 18, 1995). A 1998 study found that former college athletes had a 35% lower chance of developing breast cancer and a 61% lower chance of developing reproductive

cancer compared to non-athletes. See Carol Krucoff, *Exercise and Breast Cancer,* Saturday Evening Post, Nov. 1995, at 22.[9] Moreover, in 1970, only one out of every twenty-one girls was obese or overweight; today, even though more girls are playing sports, that figure is an alarming one in six. See Fed. Interagency Forum on Child & Family Statistics, *America's Children in Brief: Key National Indicators of Well-Being* 8-9 (2004), *available at* http://childstats.gov/pubs.asp. The available research demonstrates that more physical activity and sports participation are fundamental solutions for many of the serious health and social problems faced by our nation's young girls. See *Her Life Depends On It* at 38.[10]

In terms of emotional and mental health, women who participate in sports have higher self-esteem, a lower incidence of depression, a more positive body image, and greater

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[9] Research also demonstrates that women who participate in regular physical exercise during their reproductive years have up to a 60% reduced risk of breast cancer. *See* Leslie Bernstein et al., *Physical Exercise and Reduced Risk of Breast Cancer in Young Women*, 86 J. Nat'l Cancer Inst. 1403 (1994) (reporting that one to three hours of exercise per week over a women's reproductive lifetime may bring a 20-30% reduction in the risk of breast cancer, and four or more hours of exercise per week may reduce the same risk by almost 60%).

[10] Similarly, osteoporosis afflicts 10 million Americans, 80% of whom are women. *See* Nat'l Osteoporosis Found., Fast Facts, *at* http://www.nof.org/osteoporosis/diseasefacts.htm (last viewed Mar. 20, 2007). Physical activity and sports participation in the school-age years have been shown to increase bone density. D. Teegarden et al., *Previous Physical Activity Relates To Bone Mineral Measures In Young Women,* 28 Med. & Sci. in Sports & Exercise 105 (Jan. 1996). Likewise, Alzheimer's disease mainly affects the oldest people in the United States, who are disproportionately women. D.A. Evans et al., *Prevalence of Alzheimer's Disease In A Community Population of Older Persons Higher Than Previously Reported,* 262 J. Am. Med. Ass'n, 2251 (1989). Higher levels of physical activity earlier in life may reduce the risk for Alzheimer's later in life. *See* Sandra K. Pope et al., *Will a Healthy Lifestyle Help Prevent Alzheimer's Disease?*, 24 Ann. Rev. of Pub. Health 111 (2003).

confidence and pride in their physical and social skills. See Debra L. Schultz, *Risk, Resiliency, and Residence: Current Research on Adolescent Girls* (1991) (citing Colton & Gore, *Gender Differences in Stress and Coping Behaviors Among Late Adolescents* (1991)); *President's Council Report* at 20-23, 25-26, and 28-30. Female high school athletes show a markedly lower incidence of considering or planning a suicide attempt, and women and girls who participate in regular exercise suffer lower rates of depression. See Don Sabo et al., *High School Athletic Participation and Adolescent Suicide: A Nationwide Study*, 40 Int'l Rev. for the Soc. of Sport 5 (2004) (on file with the Women's Sports Foundation); G. Nicoloff & T.S. Schwenk, *Using Exercise to Ward Off Depression*, 9 Physician Sports Med. 23, 44-58 (1995); R.M. Page & L.A. Tucker, *Psychosocial Discomfort and Exercise Frequency: An Epidemiological Study of Adolescents*, 29 Adolescence 113, 183-91 (1994) (physically active adolescents tend to feel less lonely, shy, and hopeless than their less physically active peers). The same correlation appears to be true for minority female athletes. See *Minorities in Sports* at 7.

Sports participation also helps teenagers successfully cope with the physical and mental health challenges and risks associated with adolescence. Teenage female athletes are less than half as likely to get pregnant as non-athletes (5% and 11%, respectively), more likely to report that they have never had sexual intercourse than female non-athletes (54% and 41%, respectively), and are more likely to experience their first sexual intercourse later in adolescence than female non-athletes. The Women's Sports Found., *Sport and Teen Pregnancy* 2-3 (May 1998). Significantly reduced rates of pregnancy result for African-American and Latina female athletes as well. *Id.*; see also T. Dodge & J. Jaccard, *Participation in Athletics and Female Sexual Risk Behavior: The Evaluation of Four Causal Structures*, 17 J. of Adolescent Res. 42 (2002); *President's Council Report* at

xxv-xxvi (citing studies suggesting that higher rates of athletic participation among adolescent girls were significantly associated with lower rates of sexual activity and pregnancy).

Physical activity also appears to decrease the initiation of high-risk health behavior such as smoking or illegal drug use in adolescent girls. See, *e.g.*, M.J. Melnick et al., *Tobacco Use Among High School Athletes and Nonathletes: Results of the 1997 Youth Risk Behavior Survey*, 36 Adolescence 727 (2001); see also *The Case for High School Activities* (concluding that 92% of high school athletes do not use drugs); The Women's Sports Found., *Health Risks and the Teen Athlete* 4, 8-9 (2000) *available at* http://www.womenssports-foundation.org/binary-data/WSF_Article/pdf_file/771.pdf (female athletes involved in school or community sports were significantly less likely to use marijuana, cocaine or most other illicit drugs); R.R. Pate et al., *Sports Participation and Health-Related Behaviors Among U.S. Youth*, 154 Archives of Pediatric & Adolescent Med. 904 (2000) (same); *The Case for High School Activities* (Wyoming survey in 1998 found that only 25% of high school athletes, compared to 40% of non-athletic high school students, smoke cigarettes); Deborah J. Aaron et al., *Physical Activity and the Initiation of High-Risk Health Behaviors in Adolescents*, 27 Med & Sci. in Sports & Exercise 1639, 1642 (1995) (female athletes are significantly less likely to initiate cigarette smoking than others).

Notwithstanding their successes, women and girls still continue to face barriers to equal athletic opportunities. In the 2005-06 school year, more than 4.2 million boys played high school sports, but fewer than 3.0 million girls played. In other words, only 41% of high school athletes were girls, even though girls made up 49% of all students. See Nat'l Fed'n of State High Sch. Ass'ns, *2005-06 Participation Survey* (2006), *available at* http://www.nfhs.org/core/content-manager/uploads/2005_06NFHSparticipationsurvey.pdf;

U.S. Census Bureau, *Current Population Survey Report* (Oct. 2005), *available at* http://www.census.gov/population/www/socdemo/school/cps2005.html. Many girls who play high school sports must tolerate inferior practice and game facilities and other unequal treatment. Minority female athletes receive even fewer athletic opportunities. U.S. Dep't of Health & Human Servs., *Physical Activity and Health: A Report of the Surgeon General; Executive Summary* 12, 14 (1996).

While full equality of opportunity in athletic participation has yet to be realized, the guarantee of equal protection contained in the Fourteenth Amendment, along with the statutory non-discrimination requirements of Titles IX and VI, have played a vital role in opening up competitive athletics to female and minority student athletes. To reach the goal of equal opportunity, states and their athletic associations must be required to fulfill their non-discrimination obligations.

CONCLUSION

For these reasons, *amici* urge this Court to reaffirm its determination that TSSAA is a state actor.

Respectfully submitted,

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APPENDIX

APPENDIX A

DESCRIPTIONS OF *AMICI CURIAE* ORGANIZATIONS

The National Women's Law Center (Center) is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, the Center has worked to secure equal opportunity in education for girls and women through full enforcement of constitutional rights and Title IX in all arenas, including interscholastic and intercollegiate athletics.

For 125 years, the *American Association of University Women (AAUW),* an organization of over 100,000 members, has been a catalyst for the advancement of women and their transformation of American society. In more than 1,300 communities nationwide, AAUW plays a major role in mobilizing advocates on AAUW priority issues that promote equity for women and girls, including: creating equal opportunity in all levels of education; improving women's economic security through equal pay, family friendly workplaces, and preserving Social Security; reproductive rights; and other civil rights issues. AAUW believes athletic participation benefits women and girls in myriad ways, and supports gender equity in athletics as enforced through the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

The mission of the *Association for Gender Equity Leadership in Education (AGELE)* is to provide leadership in the identification and infusion of gender equity in all educational programs and processes, and within parallel equity concerns, including, but not limited to, age, disability, ethnicity, national origin, race, religion, sexual orientation and socio-economic status. Recognizing state athletic associations to be state actors is important to our mission because it ensures the constitutional guarantee of equal

protection of the law to girls and young women in athletics and thereby promotes the numerous benefits for female athletes that stem from athletic participation.

The *California Women's Law Center (CWLC)* is a private, nonprofit public interest law center specializing in the civil rights of women and girls. The CWLC was established in 1989 to address the comprehensive civil rights of women and girls in the following priority areas: Gender Discrimination, Women's Health, Reproductive Justice and Violence Against Women. Since its inception, the CWLC has placed a strong emphasis on advancing the rights of women and girls in education, particularly the issues of discrimination, and access to equal opportunities in athletic programs and activities.

The *Connecticut Women's Education and Legal Fund (CWEALF)* is a non-profit women's rights organization dedicated to empowering women, girls and their families to achieve equal opportunities in their personal and professional lives. CWEALF defends the rights of individuals in the courts, educational institutions, workplaces and in their private lives. For the past three decades, CWEALF has provided legal information and conducted public policy and advocacy to ensure the spirit of Title IX is implemented and enforced in educational and athletic opportunities.

Dads & Daughters is the national nonprofit working to make the world safe and fair for our daughters. A strong structure of support for equity in education is essential to that mission – and essential to the well-being and future of all the nation's children. That structure would be crippled by a decision which holds that state interscholastic athletic associations are not state actors, and therefore are not subject to obligations such as vigorous enforcement of and commitment to equal protection of the law.

The *Disability Rights Education and Defense Fund, Inc. (DREDF)*, based in Berkeley, California, is a national law and

policy center dedicated to advancing and protecting the civil rights of people with disabilities. DREDF pursues its mission through education, advocacy and law reform efforts, and is nationally recognized for its expertise in the interpretation of federal civil rights laws protecting persons with disabilities.

Equal Rights Advocates (ERA) is a San Francisco-based women's rights organization whose mission is to secure and protect equal rights and economic opportunities for women and girl through litigation and advocacy. Founded in 1974, ERA has litigated historically important gender-based discrimination cases, including *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), *Richmond Unified School District* v. *Berg*, 434 U.S. 158 (1977), *Doe* v. *Petaluma City Sch. Dist.*, 830 F. Supp. 1560 (N.D. Cal 1993), *reconsid. granted*, 949 F. Supp. 1415 (N.D. Cal. 1996), and *Dukes* v. *Wal-Mart*, 474 F.3d 1214 (9th Cir 2007). ERA currently represents female students seeking to participate in athletics on an equal basis to male student athletes. Whether state high school athletic associations are state actors is an important issue to our constituents, many of whom are women and girls from racial and ethnic minorities, whose rights to equal protection of the law have often been denied.

The *Feminist Majority Foundation (FMF)*, founded in 1987, is the nation's largest feminist research and action organization dedicated to women's equality, reproductive rights and health, non-violence and equal educational opportunities. Our programs focus on advancing the legal, social and political equality of women with men, countering the backlash to women's advancement, and recruiting and training young feminists to encourage future leadership for the feminist movement. To carry out these aims, FMF engages in research and public policy development, public education programs, grassroots organizing projects, and leadership training and cultivation programs. It is important to our goals that state high school athletic associations be seen

as "state actors" and that they are held responsible for implementing civil rights protections.

Legal Momentum advances the rights of women and girls by using the power of the law and creating innovative public policy. It is the nation's oldest legal advocacy organization devoted to women's rights. Legal Momentum, then known as NOW Legal Defense, pioneered the implementation of Title IX with PEER, its nationwide Project on Equal Education Rights, from 1974-1992. It was co-counsel in *Doe* v. *Petaluma City School District*, 949 F. Supp. 1415 (N.D. Cal. 1996), the first case to recognize that a school's failure to respond to peer sexual harassment may violate Title IX, and has appeared as *amicus* in numerous cases concerning the right to be free from sexual harassment and sex discrimination in education, including *Davis* v. *Monroe Count Board of Education*, 526 U.S. 648 (1999) and *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992).

Myra Sadker Foundation is a non-profit organization dedicated to promoting equity in and beyond schools. Myra Sadker, educator, author, and Dean at American University, exposed both the subtle and blatant education biases that limit the academic, psychological, economic and physical potential of both males and females. The foundation supports research, training and special programs to assist teachers, parents, children and other adults in eliminating such biases from America's schools.

The *National Association for Girls and Women in Sport (NAGWS)* is an organization with over 100 years of history in research, programming and advocacy for female athletes. It is one of the five national associations of the American Alliance for Health, Physical Education, Recreation and Dance (AAHPERD), a non-profit membership organization representing over 23,000 professionals in physical education and sport. Members of NAGWS have supported Title IX and gender equity initiatives for decades and continue to educate community members, athletes and professionals about these

issues through programs, research and publications. The mission of NAGWS is "to develop and deliver equitable and quality sport opportunities for ALL girls and women" so cases involving questions of enforcing prohibitions on discrimination on the bases of race, sex and national origin are of significant interest to the organization, especially as they relate to female athletes.

The *National Association of Social Workers (NASW)* is the largest organization of professional social workers in the world, with nearly 150,000 members. Created in 1955 by the merger of seven predecessor social work organizations, the purposes of NASW include improving the quality and effectiveness of social work practice in the United States and developing and disseminating high standards of social work practice, concomitant with the strengthening and unification of the social work profession as a whole. NASW recognizes that discrimination and prejudice directed against any group are not only damaging to the social, emotional, and economic well-being of the affected group's members, but also to society in general. NASW has long been committed to working toward the elimination of all forms of discrimination against women. NASW policies support "developing practices and programs that empower women and girls, enabling them to resist gender stereotypes; ... develop positive self-esteem and body image; ... and challenge sexual double standards, so girls and women might develop the power and sense of entitlement that fuels self-advocacy." NATIONAL ASSOCIATION OF SOCIAL WORKERS, *Women's Issues*, SOCIAL WORK SPEAKS, 387, 391 (2006).

The *National Council of La Raza (NCLR)* is a private, nonprofit, nonpartisan organization established in 1968 to reduce poverty and discrimination and improve life opportunities for Hispanic Americans. NCLR works toward this goal through two primary, complementary approaches: capacity-building assistance to support and strengthen Hispanic community-based organizations and applied

research, policy analysis, and advocacy. NCLR believes that recognizing state athletic associations to be state actors is important to ensuring the constitutional guarantee of equal protection of the law to girls in athletics. This guarantee promotes girls' participation in athletics, which has numerous benefits for them, particularly Hispanic girls, whose low educational attainment rates can be raised through participation in athletics.

The *National Organization for Women Foundation (NOW)* is a 501(c)(3) nonprofit organization devoted to furthering women's rights through education, litigation and advocacy. Created in 1986, NOW Foundation is affiliated with the National Organization for Women, the largest feminist *organization* in the United States, with over 500,000 contributing members in more than 450 chapters in all 50 states and the District of Columbia. Since its inception, NOW Foundation's goals have included achieving equal educational opportunities for women and girls. To that end, NOW Foundation advocates for vigorously protecting girls' and women's critically important right to equal protection under the U.S. Constitution.

Founded in 1971, the *National Partnership for Women & Families* is a national advocacy organization that develops and promotes public policies to help women achieve equal opportunity, access to quality health care, and economic security for themselves and their families. The National Partnership has a longstanding commitment to equal opportunity for women and to monitoring the enforcement of anti-discrimination laws. The National Partnership has devoted significant resources to combating sex and race discrimination in education and has filed numerous briefs *amicus curiae* in the U.S. Supreme Court and federal circuit courts of appeals to advance women's opportunities in education.

The *Northwest Women's Law Center (NWWLC)* is a regional non-profit public interest organization that works to

advance the legal rights of all women through litigation, education, legislation and the provision of legal information and referral services. Founded in 1978, the NWWLC has been, *inter alia*, dedicated to challenging barriers to sexual equality in education with a focus on eradicating gender discrimination through the enforcement of Title IX. Toward that end, the NWWLC participates as counsel and *amicus curiae* in cases throughout the Northwest, and the country, to ensure that women and girls at all educational levels have equal access to educational opportunities. The NWWLC was lead counsel in *Blaire* v. *Washington State University,* 108 Wn. 2d 558 (1987), a case that set important precedent requiring state universities to provide equal funding and scholarship opportunities for women's athletic programs. The NWWLC has also worked directly with numerous school districts and parent groups to monitor and enforce compliance with the mandates of Title IX. The NWWLC continues to serve as a regional expert and leading advocate on Title IX and gender equity.

The *Public Justice Center (PJC)* is a Maryland non-profit civil rights and anti-poverty organization that advocates nationally to protect the rights of the underrepresented. Established in 1985, the PJC has used impact litigation, appellate advocacy, public education, and legislative advocacy to accomplish law reform for its clients in numerous areas of civil rights, including gender discrimination, in employment, education, and access to government services.

The *Tennessee Lawyers' Association for Women (TLAW)* is a nonprofit professional organization whose purposes include seeking equal protection of the law and promoting equality of opportunity for women. TLAW is concerned that women and minorities will be foreclosed from challenging actions and decisions of the TSSAA on constitutional grounds and thus will find it more difficult to reach their full potential in athletics, the academic world, and their future careers.

The *Women's Bar Association of the District of Columbia (WBA-DC)*, founded in 1917, works to advance and protect the interests of women lawyers, to maintain the honor and integrity of the profession, and to promote the administration of justice. Among its many activities, WBA-DC develops and promotes the interests of women by monitoring legislation and filing *amicus* briefs on issues vital to women. WBA-DC has an interest in protecting the legal rights of girls and women, both within and outside of the legal profession, as guaranteed by Equal Protection Clause of the U.S. Constitution and by Title IX of the Education Amendments of 1972. The organization is particularly interested in protecting the right of girls to participate in athletics, a right which has historically advanced gender equality in society at large.

The *Women's Law Project (WLP)* is a non-profit public interest law firm located in Philadelphia, PA. Founded in 1974, the WLP works to abolish discrimination and injustice and to advance the legal and economic status of women and their families through litigation, public policy development, public education and individual counseling. The WLP has worked throughout its history to accomplish gender equity in school athletic programs at all levels, from middle school through college. The application of the non-discrimination clause of the Fourteenth Amendment to entities like state athletic associations that function as state actors in their regulation of public school athletic programs is essential to the ultimate elimination of discriminatory practices in these programs.

The *Women's Sports Foundation* is a 501(c)3 nonprofit education organization dedicated to advancing the lives of girls and women through sports and physical activity and ensuring equal participation and leadership opportunities for girls and women in sports and fitness. The Foundation distributes over 2 million pieces of educational information each year, awards grants and scholarships to female athletes and girls' sports programs, answers over 100,000 inquiries a

year concerning Title IX and women's sports issues, and administers awards programs to increase public awareness about the achievements of women in sports. The Foundation is interested in this case because of its important implications for gender equity in sports. Specifically, at the high school level, girls continue to lag behind boys in the quantity and quality of athletic opportunities they receive. In fact, high school girls receive 1.3 million fewer opportunities to play sports than their male counterparts. The issue of whether state high school athletic associations are state actors is very important for all who care about equal opportunity for girls and women, since these associations have the power to help ensure that our daughters are given the same opportunities for competition as our sons.

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No. 06-427

In the Supreme Court of the United States

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION,
Petitioner,

v.

BRENTWOOD ACADEMY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF AMICI CURIAE ROMAN CATHOLIC DIOCESE OF NASHVILLE, TENNESSEE, AND FATHER RYAN HIGH SCHOOL, SUPPORTING RESPONDENT

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STATEMENT OF INTEREST[1]

The Roman Catholic Diocese of Nashville ("Diocese of Nashville") is a diocese that includes 38 counties in the middle region of the State of Tennessee. Founded in 1837, the diocese includes twenty-two independent schools serving approximately 6,400 students, including three high schools with nearly 2,000 students. The mission of the schools in the Diocese of Nashville is to promote quality education in the Catholic tradition. All of the secondary schools in the Diocese of Nashville are members of the Tennessee Secondary School Athletic Association ("TSSAA").

Father Ryan High School, Inc., one of the schools in the Diocese of Nashville, is a coeducational, independent, secondary school located in the Oak Hill area of Nashville, Tennessee. The school is dedicated to providing an exemplary educational experience aimed at fully developing the creative, intellectual, spiritual, athletic, and social maturity of each of its approximately 900 students. Founded in the 1920s, Father Ryan High School currently has an athletic program that includes a variety of interscholastic competitive sports activities, including football, basketball, soccer, baseball, track, cross country, and volleyball. Father Ryan High School participates as a member of the TSSAA because interscholastic athletic competition is an important aspect of the educational experience for many of the school's students and because there are no other realistic options for a secondary school in Tennessee to engage in interscholastic athletics.

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[1] The parties have consented to the filing of this *amicus* brief. Letters of consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, *amici* state that none of the parties or their counsel wrote this brief in whole or in part and that no one other than *amici* made any monetary contribution to the preparation or submission of this brief.

Both the Diocese of Nashville and Father Ryan High School have an abiding interest in ensuring that this country's long tradition of protecting First Amendment speech rights is not undermined by efforts, such as those by the TSSAA in this case, to impose restrictions on those freedoms needlessly. Independent schools like Father Ryan and the other schools in the Diocese of Nashville rely on accurate and personal communications with prospective students and their families to inform them of the range of unique opportunities they offer. A novel rule of law, like the one urged by the TSSAA in this case, that abridges the right of member schools to convey truthful and valued information, ostensibly on the basis that such schools have availed themselves of opportunities to participate in the TSSAA or other state regulatory programs, unduly burdens the flow of important information between schools and prospective students and needlessly strikes at the core of the First Amendment.

INTRODUCTION AND SUMMARY OF ARGUMENT

The court of appeals correctly determined that the recruitment rule ("Recruiting Rule" or "Rule") promulgated and enforced by the TSSAA—previously found by this Court to be a state actor due to its symbiotic relationship with the Tennessee State Board of Education—was an overbroad regulation of speech that, when properly subjected to "intermediate scrutiny" under a traditional First Amendment analysis, could not survive constitutional challenge as applied to Brentwood. Petitioner, joined by the Solicitor General as *amicus curiae*, argues for reversal by this Court principally on grounds that the regulatory restraint imposed on speech in this instance derives from Brentwood's "voluntary" or "contractual" participation in the TSSAA and not from an exercise of sovereign power, which, they insist, thus requires more deferential review than accorded below and should lead

to upholding the constitutionality of the TSSAA's actions. Yet, the law is and, we respectfully submit, should remain otherwise, as the Sixth Circuit majority determined.

This Court previously concluded that the TSSAA is a state actor, and no good reason has been suggested to revisit that decision. The "entwined" relationship between the State Board of Education and the TSSAA remains unchanged since the Court's earlier decision. Nor is there any suggestion on this record, or otherwise, that, in regulating athletics among high schools and middle schools throughout the State of Tennessee, the TSSAA acts under the auspices of anyone other than the State Board of Education, or that its enforcement decisions are made for any purpose other than to further the State's educational interests. Indeed, the TSSAA insists that it undertakes its regulatory activity solely to advance three interests of the State (not of the TSSAA): to keep high school athletics subordinate to education; to protect student athletes from exploitation; and to foster competitive equality on the playing field among member schools.

The Recruiting Rule was fashioned by the TSSAA for the State Board of Education and, in 1972, was openly embraced by the State Board through its review and specific approval. It has since been revisited, but not changed, on multiple occasions, each time under the watchful eye of the State Board, and with the State Board's full endorsement. Never has it been suggested—until legal arguments in this case—that the TSSAA either regarded or treated its Recruiting Rule as simply a contractual obligation. The Rule was handed down by the TSSAA for and on behalf of the State as a regulation on recruitment having equal application on member schools throughout the State, adopted and thereafter presented very much as an exercise of sovereign

power, and nowhere portrayed as merely a negotiated contractual provision.

This Court has long emphasized that First Amendment rights are not abridged or, as the TSSAA argues, "waive[d]," *see* Pet. Br. at 21-22, merely because the speech restriction derives from "voluntary" acceptance of, or participation in, a government benefit. *See, e.g., Speiser v. Randall*, 357 U.S. 513 (1958). To be sure, Supreme Court precedents involving government employees and federally funded programs have carved out modified First Amendment principles applicable to those particular cases, but this Court has been careful to limit application of those modified tests to fit the unique circumstances presented. For good reason, it has never extended those holdings to any situation that even remotely resembles the circumstance where, as here, a statewide regulator constrains the free-speech rights of one of its constituents (not one of its employees) through a restriction wholly unrelated to government funding of its own speech. Accordingly, the court of appeals was correct in holding that, to the extent the exercise of regulatory authority by the TSSAA restricted speech, it was, at a bare minimum, subject to "intermediate scrutiny" under the First Amendment.

It thus was incumbent upon the TSSAA in order to survive constitutional challenge first to show that its Recruiting Rule furthered a substantial governmental interest. The Sixth Circuit examined the three state interests asserted, and upheld the trial court's finding that two of the three had been shown to be substantial (*i.e.*, subordinating athletics to academics and non-exploitation of student athletes), but that no such showing had been made by the TSSAA for the third interest offered (*i.e.*, achieving "competitive equality on the playing field").

Both the TSSAA and the Solicitor General argue that this third interest is so "self-evidently important" that it can be taken on faith, and the TSSAA should, therefore, not have been faulted for its failure to provide an evidentiary basis for the assertion that "competitive equality" is a substantial governmental interest. Yet, the secondary support they offer for their "self-evident" proposition shows only that the sporting community regards "competitive equality" as important for college athletics and the professional ranks, whether to maintain the line between amateur and professional athletes (NCAA), or to enhance the competitiveness and revenues of professional sports (NBA and NFL). Nowhere does it appear that there is any particular state interest, much less a substantial one, in achieving competitive parity in interscholastic sports at the grade school level—as opposed, for example, to having an abiding interest in preventing illegal recruitment (*i.e.*, use of money or gifts), or the enrollment of academically ineligible athletes—nor, of equal importance, why it should be assumed otherwise. That is not to say that a State could not, perhaps, make such a showing, but rather to underscore that the proposition is far from self-evident, that (aside from arguments of counsel in this case) it appears not to have had much practical application among the TSSAA member schools over the years, and that, as the court below correctly held, the TSSAA failed in this case to make the showing needed to establish what it asks this Court to take on faith.

Nonetheless, given that at least two substantial state interests were identified, and even taking the third on faith for present purposes, it still remained incumbent upon the TSSAA under the First Amendment to show that application of its Recruiting Rule to Brentwood Academy in the circumstances of this case was appropriately tailored so as not to burden more speech than necessary to serve the stated government purposes. With specific reference to the

Academy's Spring practice letter and its coach's follow-up calls, the appeals court correctly held that this showing had not been made.

It is unquestioned that the Rule leaves the TSSAA wide enforcement discretion. In broad terms it prohibits "the use of undue influence" on students or their parents by "any person" (whether or not connected with the target school) to "secure or retain a student for athletic purposes." *Brentwood Academy v. TSSAA*, 442 F.3d 410, 416 (6th Cir. 2006). While there is general guidance suggesting that "undue influence" will be regarded as anything (including speech) that "exceed[s] what is appropriate or normal," *id.*, the TSSAA is the sole and final arbiter of appropriateness and normality.

There is thus a strong argument that the Rule fails First Amendment scrutiny facially. It bans "undue influence" without sufficient definition or guidance (other than "what is appropriate or normal") to make clear what is and is not offensive speech; it includes not only school personnel within its wide net ("persons connected"), but also others having no relationship whatsoever with or to the target school (persons "not connected"); it imposes a "no contact" prohibition on coaches prior to a student's enrollment, even as to "appropriate or normal" contacts of a non-recruiting nature (such as the informational letter and calls in the present case), and defines "enrollment" as student attendance at a school for 3 days. As such, whether regarded as a content-neutral time, place or manner restriction on speech, or as one that is content-based (with the focus being essentially on the content of the message and its effect on the listener),[2] the Rule on its face sweeps far too broadly, going

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[2] *See* Brief of *Amicus Curiae* Association of Christian Schools International.

well beyond speech constraints on impermissible recruitment by school personnel necessary to protect the state interests said to be at stake.

Even as more modestly considered by the court below, the Sixth Circuit's finding of unconstitutionality, as applied, cannot be faulted. The school letter and coach's calls did no more than extend an invitation to Spring football practice to incoming freshmen already committed to attending Brentwood classes and emphasized that participation was strictly optional. It certainly can be argued that the communications were not in these circumstances intended "to secure or to retain [any of the already committed and enrolled freshmen] student[s] for athletic purposes." More to the point, the speech in question in no way undermined the State's primary academic interests, nor remotely threatened to exploit student athletes; and it clearly had no effect whatsoever on the stated interest of "competitive equality," since all those contacted were, well before, already Brentwood bound. The court below thus correctly found that, as applied to Brentwood's Spring practice letter and the follow-up phone calls, the TSSAA's finding of a violation of its Recruiting Rule served no legitimate substantial state interest and thus impermissibly interfered with First Amendment speech rights.

ARGUMENT

I. THE TSSAA's ENFORCEMENT OF ITS RECRUITING RULE CONSTITUTED STATE ACTION TO WHICH FIRST AMENDMENT PROTECTIONS APPLY

If the TSSAA could have its way, it would have no serious need to pay heed to its members' First Amendment rights, at least not with more than a passing glance, because constitutional protections against regulated speech would

have no direct application to an entity like the TSSAA, at least not with anywhere near the same force as they might apply elsewhere. Thus, its argument of first order, in hopes of avoiding constitutional scrutiny of its Rule altogether, is to ask this Court to revisit its holding in *Brentwood Academy v. TSSAA*, 531 U.S. 288 (2001) (hereinafter "*Brentwood I*") that the TSSAA is a state actor. Pet. Br. at 46-50. Failing that, the TSSAA, joined by the Solicitor General as *amicus curiae*, further argues that, because the TSSAA is akin to a "voluntary" or "contractual" government program in which Brentwood chose to participate, Brentwood essentially acquiesced in speech restrictions included in the Recruiting Rule as a condition of membership so long as those restrictions reasonably related to legitimate government interests, and, under that standard, Brentwood has no cause for complaint that the Spring practice letter and follow-up calls were held by the TSSAA to violate the Rule. *Id.* at 20-32. Brief of Solicitor General ("SG Br.") at 10-18. Neither argument provides a basis for reversal of the decision below.

A. There Is No Basis to Reconsider *Brentwood I*

This Court should not revisit its holding in *Brentwood I* that the TSSAA's "regulatory activity [against Brentwood] may and should be treated as state action." 531 U.S. at 290. The Court's majority there properly concluded that the TSSAA, as a statewide association incorporated to regulate athletic competition among public and private high schools, was a state actor, and, in fashioning and enforcing its athletic regulations, it engaged and is engaging in state action. This holding in *Brentwood I* was well founded, not just because the TSSAA traditionally had been authorized and seen to regulate in lieu of the State Board of Education's exercising its own authority, *id.*, nor because the State Board of Education repeatedly recognized (and, in 1972, by formal "designation" charged) the TSSAA as the regulator of

interscholastic athletics for public and private secondary schools statewide, but also because the TSSAA includes virtually all public schools in the state of Tennessee, acts solely through the public schools' representatives, draws its officers from public school principals only, and derives much of its funding from the dues paid by its public members and from "income received in their stead." *Id.* at 290-93.[3]

The TSSAA urges reconsideration of *Brentwood I*, not due to changed circumstances or intervening developments in the law (neither of which exists), but on a recycling of its earlier arguments. Yet, the contention that the TSSAA's enforcement of its Recruiting Rule against Brentwood can be regarded as independent action because the State itself played no role in the enforcement decision or action (Pet. Br. at 46-47) was addressed and fully answered by the Court's majority when the case was heard earlier. Nor was *Brentwood I*'s holding of the TSSAA as a state actor a departure from prior precedent. Previously, in *NCAA v. Tarkanian*, 488 U.S. 179 (1988), this Court similarly observed that an organization regulating interscholastic athletics whose "membership consist[s] entirely of institutions within the same State, many of them public institutions created by the same sovereign" should properly be regarded as engaging in state action when it enforces its rules against a member. *Id.* at 193 n.13; *see also Amicus* Brief filed by National Women's Law Center.

There is thus no cause to revisit *Brentwood I*. The closely entwined, symbiotic relationship between the State Board of Education and the TSSAA, as overwhelmingly

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[3] While the TSSAA has private schools as members, such as Brentwood Academy and Father Ryan High School, no private school representative is, or ever has been, an officer of the TSSAA or sat on its governing board. *Cf.* 531 U.S. at 299.

established by the record evidence in this case, allows for no conclusion other than that the TSSAA, as the authorized regulator of interscholastic athletics for all public schools and private member schools throughout the State, was operating at all times as a state actor. *Brentwood I*, 531 U.S. at 290. Nor can there be any question that a state actor (like the TSSAA) always engages in state action when acting within the scope of its regulatory authority, as, in the present case, when enforcing its own Recruiting Rule. *See, e.g., Griffin v. Md.*, 378 U.S. 130, 135 (1964) ("If an individual is possessed of state authority and purports to act under that authority, his action is state action.").

B. Brentwood Did Not Voluntarily Surrender Any Measure of First Amendment Protection by Participating in the TSSAA

It is further argued, however, that, even as a state actor, the TSSAA should be accorded considerable deference in its regulation of members' speech, because the participation of Brentwood and others is said to be "voluntary" or "contractual" by nature. *See* Pet. Br. at 20-32; SG Br. at 9-25. On this reasoning, the TSSAA and the Solicitor General maintain that the Sixth Circuit's application of traditional "intermediate" scrutiny to ascertain the constitutionality of the TSSAA's speech restrictions on Brentwood was in error. We respectfully disagree, and submit that the authority offered in support of adopting a more deferential First Amendment review standard in this case has little application to the present circumstances and provides no justification for a departure here from the "intermediate" scrutiny utilized below.

Our starting point necessarily is with *Brentwood I*'s holding of the TSSAA as the recognized statewide regulator of interscholastic secondary school athletics in Tennessee.

531 U.S. at 290-91. As such, its enforcement of its rule against TSSAA members, including Brentwood, amounts to statewide exercise of regulatory power that, contrary to the TSSAA's assertion, stands on much different footing under this Court's First Amendment jurisprudence than a state actor acting as a contract employer, an independent contractor, or a funding entity intent on promoting a particular government message.

In those latter instances, it was the particulars of the relationship—whether it be employer-employee, independent contractor, or funding beneficiary—that allowed for a bit more play in the First Amendment joints in the area of speech. As this Court has heretofore noted, "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering v. Bd. of Educ. Of Twp. High Sch. Dist. 205, Will County*, 391 U.S. 563, 568 (1968); *Connick v. Myers*, 461 U.S. 138, 140 (1983). Moreover, those interests such as "promoting the efficiency of [government] services through its employees" (*Pickering*, 391 U.S. at 568), and "'[maintaining] proper discipline in the public service'" (*Connick*, 461 U.S. at 151 (quoting *Ex parte Curtis*, 106 U.S. 371, 373 (1882))), are recognized as applying with equal force to government contractors. *See Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996) ("The similarities between government employees and government contractors with respect to [freedom of speech] are obvious. The government needs to be free to terminate both employees and contractors for poor performance, to improve the efficiency, efficacy, and responsiveness of service to the public, and to prevent the appearance of corruption."). Just this past year in *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1958 (2006), this Court underscored the vital interests that are highly unique to the government employee and contractor speech arena:

> Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services. Cf. *Connick*, *supra*, at 143, 103 S. Ct. 1684, 75 L. Ed. 2d 708. Public employees, moreover, often occupy trusted positions in society. When they speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions.

Similarly unique interests were also at issue in *Snepp v. United States*, 444 U.S. 507 (1980), another of the government employee cases relied upon by the TSSAA and the Solicitor General. There, in upholding the "no publication without government prior approval" restriction against a former CIA employee, the Court emphasized that "Snepp's employment with the CIA involved an extremely high degree of trust" based upon the government confiding to him, as employee, highly secret and classified information important to U.S. national security. *Id.* at 510-11. Nothing approaching the unique facts of *Snepp* can be said to exist here.

So, too, with federal funding programs, a degree of latitude in restricting speech has been allowed where the relationship between the grantor and the grantee revolves essentially around promoting a government message. As this Court pointed out in *Legal Servs. v. Velasquez*, 531 U.S. 533, 541 (2001), "'when the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to insure that its message is neither garbled nor distorted by the grantee.'" (Quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*,

515 U.S. 819, 833 (1995)). Thus, the restrictions on viewpoint-based speech upheld as a condition of funding in *Rust v. Sullivan*, 500 U.S. 173 (1991), survived a First Amendment challenge only because, as this Court later explained in *Velasquez*, application was limited to where "the government is itself the speaker . . . or . . . the government 'used private speakers to transmit information pertaining to its own program.'" *Velasquez*, 531 U.S. at 541.[4]

None of the rationales offered in those other relationships suggest a basis for permitting the TSSAA, as a regulator of speech, to, in similar fashion, treat its members as employees, independent contractors, or funding partners. The Sixth Circuit thus correctly declined to loosen the level of First Amendment scrutiny that should attach to statewide regulation of interscholastic athletics.

Nor does characterizing Brentwood's membership in the TSSAA as "voluntary" or "contractual" require any different conclusion on the supposition, offered by the TSSAA, that Brentwood "effectively waive[d] . . . any challenge to the conditions" imposed by the TSSAA. *See* Pet. Br. at 21. This Court has routinely cautioned against

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[4] The government subsidy cases are wide of the mark for other important reasons as well. In all of the federal funding or subsidy cases cited by the TSSAA and the Solicitor General, the participant did not need the funding in order to carry on the activities sought to be encouraged by the funding. The federal assistance was purely a subsidy to encourage (*not* enable) the behavior sought by Congress. Thus, in both *Rust* and *United States v. Am. Library Ass'n*, 539 U.S. 194 (2003), program participants—family planning centers in *Rust* and libraries in *Am. Library Ass'n*—could and, in some instances, did carry on activities encouraged by the federal program without subsidies from the government. In this case, there is no dispute that Brentwood and Father Ryan (and, for that matter, any other secondary school in Tennessee) would be unable to participate in interscholastic athletic competition in Tennessee without membership in the TSSAA.

regarding the" voluntary" acquiescence in a regulated government benefit as a waiver or effective waiver of First Amendment rights.

In *Speiser v. Randall*, 357 U.S. 513 (1958), for example, the Court long ago admonished that any conditions placed upon benefits offered by a state actor "cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms." *Sherbert v. Verner*, 374 U.S. 398, 405 (1963) (citing *Speiser*, 357 U.S. at 526). In *Speiser*, the Court invalidated a condition that limited tax exemption availability to war veterans who affirmed that they did not advocate the overthrow of the U.S. Government by unlawful means. 357 U.S. at 514-15. While the state was under no obligation to afford such an exemption, and those that availed themselves of the exemption did so voluntarily, the Court held that imposition of such a condition upon a public benefit inevitably chilled the exercise of First Amendment rights of expression and thereby threatened to "produce a result which the State could not command directly." *Id.* at 526.

In *Sherbert*, the Court again rejected an attempted interference with First Amendment freedoms that was being justified as permissible because the restraint came from voluntary or contractual participation in a government program, rather than from a naked exercise of sovereign authority. In invalidating a state regulation that conditioned unemployment compensation benefits on the applicant's ability to work on Saturday, which infringed the plaintiff's First Amendment right to observe her day of Sabbath, the Court declared:

> Nor may the South Carolina court's construction of the statute be saved from constitutional infirmity on the ground that

> unemployment compensation benefits are not appellant's "right" but merely a "privilege." It is too late in the day to doubt that liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.

Id. at 404. Significantly, the Court expressly rejected the government's arguments for a relaxed or deferential analysis of the First Amendment restriction at issue and, instead, applied strict scrutiny analysis in striking down the restraint. *Id.* at 406.

More recently, in *Velasquez*, 531 U.S. at 533, the Court again held that one of the conditions imposed by Congress on the states' use of federal funds for legal services for the indigent—*i.e.*, that such funds not be used in an effort to amend or otherwise challenge existing welfare law—violated the First Amendment rights of fund recipients and their clients. *Id.* at 536-37. The Court refused to relax its First Amendment analysis based upon the "voluntary" nature of the program or the "choice" that fund recipients had to reject the funds.

Brentwood's "voluntary" participation in the TSSAA no more compromised, or implied a waiver of, its free-speech rights under the First Amendment than the claimed "voluntariness" of those program participants in *Speiser*, *Sherbert*, and *Velasquez* lessened the need for exacting judicial vigilance of their First Amendment complaints. As a high school participating in interscholastic athletic competition under the regulatory regime promulgated and enforced by the TSSAA, Brentwood should not and does not stand on any different footing from the voluntary recipients of legal service funds in *Velasquez*, the war veterans voluntarily seeking tax benefits in *Speiser*, or the individual

availing herself of the state's unemployment program in *Sherbert*.

Just as the Court in each of those cases refused to alter the First Amendment rights of those litigants by according greater deference to the state, it should refuse to do so here. That is especially so because, as recognized by the district court, "the TSSAA is effectively the only game in town" for any high school wishing to maintain an interscholastic athletic program in the state. *Brentwood Academy v. TSSAA*, 304 F. Supp. 2d 981, 997 (M.D. Tenn. 2003). Thus, while the complainants in *Speiser*, *Sherbert*, and *Velasquez* may have had a realistic "choice" of not participating in the government programs at issue—which still did not save the speech restrictions from heightened scrutiny in those cases—any notion that Brentwood's participation in the TSSAA is truly "voluntary" is, as the district court specifically found, wholly illusory. *Id.* at 997. Thus, the court of appeals correctly applied intermediate scrutiny to the Recruiting Rule, and no reasoned basis has been offered to disturb that decision.

II. PROPERLY SCRUTINIZED, THE TSSAA'S RECRUITING RULE FAILS CONSTITUTIONALLY

A. The Recruiting Rule Is Void for Vagueness and Overbreadth

While we believe the court below correctly determined that the Recruiting Rule, as applied to Brentwood, unconstitutionally restricted speech insofar as it condemned the Spring practice letter and phone calls (*see* discussion at Part II.B, *infra*), we are also of the view that the Rule, as written, is too vague, and its speech restrictions sweep too broadly, to survive facially. While *amici* the Diocese of Nashville and Father Ryan High School would

have no such constitutional concerns with a well-crafted and narrowly tailored rule against recruiting, the current wording of the existing Recruiting Rule is so imprecise and open-ended that the TSSAA has virtually unbridled discretion to needlessly and unjustifiably burden free speech in the name of regulating interscholastic athletics.

This Court has long admonished that "'precision in regulation must be the touchstone in an area so closely touching our most precious freedoms . . . . Because First Amendment [rights] need breathing space to survive, government may regulate in the area only with narrow specificity.'" *Keyishian v. Bd. of Regents of NY*, 385 U.S. 589, 603-04 (1967) (quoting *NAACP v. Button*, 371 U.S. 415, 432-38 (1963)). Where, as here, the regulation at issue "interferes with the right of free speech," a particularly "stringent vagueness test" applies. *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). Nor has this Court shown any reluctance to embrace facial attacks to state regulations that restrict freedom of speech "where the defect in the [regulation] is that the means chosen to accomplish the state's objectives are too imprecise, so that in all of its applications [it] creates an unnecessary risk of chilling free speech." *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 967-68 (1984).

The Recruiting Rule of the TSSAA is wholly lacking "'terms susceptible of objective measurement,'" *Keyishian*, 385 U.S. at 604 (quoting *Cramp v. Bd. of Pub. Instruction of Orange County*, 368 U.S. 278, 286 (1961)), and plainly suffers from overbreadth. It expansively prohibits the use of "undue influence" on a student or his or her parents or guardians by "any person connected, or not connected" with the school to recruit a student for "athletic purposes." Does the measure of "undue influence" rest with the student, his or her parents, a school official, a person not at all connected

with the school, a TSSAA representative, or, perhaps, some combination of perceptions from this list? That is a question left unanswered by the Rule. Plainly, "undue influence" is a far more subjective than objective criterion that can predictably be viewed differently in the eyes of different beholders. That which might understandably be regarded as of no particular influence (let alone undue influence) to a student or his/her parents—such as the letter and phone calls at issue here—could be considered by an uninvolved third party on hindsight—such as the TSSAA—as undue influence. A rule that subjects the First Amendment right of speech to so nebulous a restraint, capable of being wielded with impunity on the subjective whim of a state-appointed regulator, is constitutionally offensive under any and all of its applications. *See Houston v. Hill*, 482 U.S. 451, 465-66 (1987) (invalidating ordinance with terms susceptible to "open-ended" interpretations).

Nor do the non-binding interpretive guidelines of the TSSAA provide a cure. Their guidance is that "undue influence" may be regarded as "exceeding what is appropriate and normal." Indeed, the TSSAA advises that the "major theme" of its Recruiting Rule is "exceeding what is normal and appropriate." Yet, the terms "appropriate" and "normal" are nowhere defined in the Rule or elsewhere, and, insofar as we have been able to determine, are devoid of "settled usage or tradition of interpretation in law." *See Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1049 (1991). Members of this Court have repeatedly recognized as much. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 24-25 (1981) (holding that the phrase "appropriate treatment" is too vague to be enforceable); *Vaca v. Sipes*, 386 U.S. 171, 201 (1967) (Fortas, J., concurring) (labeling as "exceedingly vague" the term "appropriate damages" to describe available remedy); *Tory v. Cochran*, 544 U.S. 734, 740 (2005)

(Thomas, J., dissenting) (emphasizing that the term "any appropriate party" is vague).

No less than with the term "undue influence," the terms "appropriate" and "normal"—and, certainly, what "exceeds" conduct that is "appropriate" and "normal"—invite numerous interpretations that depend solely on a subjective viewpoint, although it is far from clear under the Rule exactly whose viewpoint. Whatever the governmental interests to be served (*see* Part II.B, *infra*), if restrictions on speech are deemed necessary to further those interests, the First Amendment demands that they be applied with a scalpel, not a sledgehammer, so as not to unnecessarily intrude on the right to speak freely and openly. *See Joseph H. Munson, Co.*, 467 U.S. at 967-68. Under all its applications, the present Recruiting Rule violates that constitutional command.

The vagueness of the Rule's operative terms is further aggravated by imprecision elsewhere in its text, which finds no helpful enlightenment in what the TSSAA offers as guidelines. For example, the phrase "to secure or to retain a student *for athletic purposes*" is left to open-ended interpretation. *See Hill*, 482 U.S. at 465-66 (invalidating ordinance with terms susceptible to "open-ended" interpretations). Is a high school communicating for an "athletic purpose" if it includes a paragraph about its interscholastic athletic program in a written communication about the school's curriculum and extracurricular activities to a number of eighth graders who are talented in arts and sciences, music, mathematics, *and* athletics? If the school's communication is to *all* incoming students regardless of their interest or prowess in sports, as was the case with the Brentwood communications here, should an "athletic purpose" be assumed? In this instance, as indicated, those who were contacted were students who had already signed

enrollment contracts and committed to attend the high school. Yet, remarkably, the contact was found by the TSSAA as intended "to secure or retain a student for athletic purposes." *See* pp. 23-27, *infra*.

The explanation by the TSSAA that its Recruiting Rule imposes what amounts to a "no contact" rule on high school coaches provides no justification. To the contrary, that feature only underscores the Rule's overbreadth, condemning all communications by a coach with prospective students or their parents, even if (as here) "appropriate" and "normal," because the TSSAA, as an exercise of its unfettered discretion, *deems* any such contact to be per se "undue influence." Moreover, by defining "enrolled" to mean that a student has "attended 3 days of school" it would appear that a coach can have no contact with fully matriculated freshmen for their first days of class attendance, even during, for example, TSSAA sanctioned football practice, for fear of violating the Recruiting Rule. So unnatural an interpretation that allows wholesale encroachment by a state actor on First Amendment expression simply cannot be constitutionally tolerated. *See Griffin v. Wis.*, 483 U.S. 868, 876 n.3 (1987) (finding that the state court could not constitutionally adopt so unnatural an interpretation of the language that the regulation would fail to provide adequate notice); *cf. Kolender* v. *Lawson*, 461 U.S. 352, 357-358 (1983); *Lambert* v. *Cal.*, 355 U.S. 225, 228 (1957).[5]

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[5] The defectively overbroad nature of the Recruiting Rule is further highlighted by the "feeder pattern" exception reflected in the Rule's Guidelines. The Guidelines prohibit initial or prearranged contact with middle school students at the TSSAA member and non-member schools by a high school coach or other school representatives except where there is a "feeder pattern." No reasoned basis for distinguishing between "feeder patterns"—itself an undefined and vague term—and other

This Court has never hesitated to strike down a regulation, like the instant Recruiting Rule, that sweeps too broadly or is plagued by open-ended imprecisions that chill the free flow of constitutionally protected speech. In *Hill*, for example, the Court invalidated a city ordinance that prohibited individuals from "in any manner oppos[ing], molest[ing], abus[ing] or interrupt[ing] any policeman in the execution of his duty . . . ." 482 U.S. at 455 Much like the terms "undue influence," "appropriate" and "normal" associated with the TSSAA's Rule, enforcement of the ordinance in *Hill* rested on essentially subjective terms without any discernible objective content—*e.g.*, "oppose," "abuse," and "interrupt"—that lacked any meaningful particularization. There, the Court invalidated the ordinance on vagueness grounds and, in the process, firmly declined the government's entreaty to uphold the validity of the ordinance out of deference for the compelling public interest in effective law enforcement. Finding the First Amendment's guarantees too precious to surrender to such loosely worded proscriptions, the Court struck down the ordinance as a particularly offensive example of constitutional imprecision that gave rise to intolerable intrusions on "a substantial amount of constitutionally protected speech, and accord[ed] the police unconstitutional discretion in enforcement." *Id.* at 466.

The same result was reached in *Kolender*, 461 U.S. 352, where the Court invalidated a statute that required persons who wandered on the streets to provide, upon request

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situations has been offered, and it is particularly difficult to discern what governmental interest (let alone substantial governmental interest) conceivably justifies the TSSAA treating the benign Spring practice notices in this case, where the students contacted had already signed enrollment contracts with Brentwood and paid the required deposit, with so much more hostility than it has elected to treat similar notices sent by a high school coach to students at a "feeder" school.

by a government official, a "credible and reliable" identification. Characterizing its concern with the legislation as a vehicle having the "potential for arbitrarily suppressing First Amendment liberties,'" *id.* at 358 (quoting *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 91 (1965)), the Court found the words "credible and reliable" to be essentially standardless, thereby leaving too much enforcement discretion in the hands of government officials. *Id.* at 358. As there observed, "as weighty as th[e] concern [with curbing criminal activity] is, . . . it cannot justify legislation that would otherwise fail to meet constitutional standards for definiteness and clarity." *Id.* at 361.

As has regularly been pointed out, these void-for-vagueness and overbreadth cases serve a number of important values, including assuring that individuals know what types of conduct are prohibited, discouraging arbitrary and discriminatory enforcement, and avoiding the risk of inhibiting the exercise of First Amendment freedoms because those subject to the rule will "steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964)). All of these values are directly implicated with enforcement of the TSSAA Recruiting Rule. Its invalidation as a facially unconstitutional encroachment on First Amendment rights of free speech is, therefore, entirely warranted.

B. The Recruiting Rule as Applied by the TSSAA to Brentwood Is Unconstitutional

Even if the Court is unprepared in this case to find the Recruiting Rule facially unconstitutional, it certainly should affirm the Sixth Circuit's ruling that the TSSAA's enforcement of the Rule against Brentwood violated the

Constitution. The Brentwood letter and phone calls invited incoming freshmen already committed to Brentwood Academy to Spring football practice, and emphasized that attendance was strictly optional and should not interfere with any of their other school activities. It certainly can be argued that the communications were in these circumstances neither intended "to secure [n]or to retain [any of the already committed freshmen] student[s] for athletic purposes." Given that Spring football practice was at the time a sanctioned activity by the TSSAA, to conclude that the coach's notification letter and phone calls amounted to "undue influence"—especially when neither the students nor their parents regarded the communications as either inappropriate or abnormal—impermissibly stretches the definition of "undue influence" well beyond its constitutional breaking point.

Applying intermediate scrutiny, the court of appeals agreed with the trial court's findings that, while two of the three state interests asserted by the TSSAA for its Recruiting Rule (*i.e.*, keeping athletics subordinate to academics and preventing "exploitation" of student athletes) were substantial, the TSSAA failed to satisfy its burden of proving that maintenance of a competitive playing field in high school athletics is a third substantial state interest served by the Rule. The court below further concluded that the "TSSAA did not show that the application of the recruiting rule to Brentwood was narrowly tailored to serve the TSSAA's substantial interests." *Brentwood Academy*, 442 F.3d at 430.

Contrary to the contention of the TSSAA and the Solicitor General, the Circuit Court committed no error in declining to find, based upon counsel's *ipse dixit* and little else, that "competitive equality" in high school athletics could legitimately be regarded as a third substantial state

interest. The TSSAA complains that, even if probative evidence is lacking, the Sixth Circuit can be faulted for not exercising its own "common sense," *see* Pet. Br. at 33, as sufficient basis for accepting the "competitive equality" interest as self-evident.

Yet, common sense would seem to dictate the very opposite conclusion from the one urged by the TSSAA and the Solicitor General. As established in the district court, 304 F. Supp. at 984-85, the State undeniably has a strong interest in keeping athletics subordinate to academics. It is thus intuitively doubtful that the State would regard the promotion of athletic competitiveness among the TSSAA member schools as anywhere near the "self-evident" importance that has been suggested. Indeed, undertaking to maintain a school's athletic competitiveness vis-à-vis other member schools would appear to introduce far more emphasis on sports programs than their subordinated status in the State's hierarchy seems to anticipate, which could well leave the overarching academic interest more, rather than less, vulnerable to athletic agendas.

Nor do the secondary materials referenced by the TSSAA to nonetheless introduce a "competitive equality" state interest by force of *ipse dixit* help its cause. At most, these materials stand for the unremarkable proposition that "cooperat[ion] off the field" helps competition "on the field," *see* Pet. Br. at 34 (quoting Paul C. Weiler, *Leveling the Playing Field 2* (2000)); or that competitive balance is important to the marketability and revenue stream of professional sports, *id.* (citing *Wood v. Nat'l Basketball Ass'n*, 809 F.2d 954, 961 (2d Cir. 1987) and *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1175 (D.C. Cir. 1978)); or that the NCAA views its eligibility requirements as important to maintaining the line between college and professional athletics. *Id.* at 35. Nowhere is there even the hint of a suggestion that

maintaining "competitive equality" at the high school level is a substantial government interest that could justify encroachments on freedom of speech.

Nor did the lower court err in concluding that the TSSAA's punishment of Brentwood for the speech involved here imposes a far greater burden on First Amendment rights than is necessary to further any of the governmental interests implicated. As the Sixth Circuit noted, the coach's communications about Spring football practice came well after all of the recipients had made their decision to enroll in Brentwood and signed an enrollment contract. Abundant other information extolling the virtues of Brentwood had previously been received and digested by the students and their parents. The TSSAA makes no suggestion that this prior information disserved the stated government interest of keeping athletics subordinate to academics. It strains credulity to suggest that an isolated notice of Spring football practice later received by those already committed to the school so threatened to subordinate the primacy of the academic mission as to demand punishment under the Recruiting Rule, particularly when none of the students notified had ever signaled that they were having second thoughts or reservations about their decision to enroll at Brentwood (*and see* note 5, *supra*).

Likewise, the speech punished here cannot reasonably be said to be a form of exploitation of student athletes that endangered the second stated government interest served by the Rule. The coach's communications, first by letter and then by follow-up phone calls, were nothing more than notification of a TSSAA authorized activity (Spring football practice) *open to all Brentwood students*. The recipients were not singled out for their athletic skills or, as with colleges, because they were on an athletic scholarship. Rather, they received notice because, and only because, they

had chosen to enroll in Brentwood Academy, and football was one of the extracurricular activities that the school offered to all enrollees. Perhaps if the coach had been more selective in his mailing and calls, targeting, for example, only those regarded as the most athletic prospects, one might have been able to argue there existed some element of "exploitation." But, that admittedly did not occur. Nor was there an effort to "lean on" or otherwise influence anyone to attend Spring practice—say, for example, the larger and more skilled players—or any endeavor to promote the Brentwood football program in any respect. Indeed, information about Brentwood football had been distributed to these students previously through accepted "alternative avenues of communication." Accordingly, as the courts below found, in this instance "[n]either students nor parents were exploited in theory or in fact" (442 F. 3d at 428), and the speech prohibition in question thus imposed a far greater burden than necessary to further the government's interest in protecting student athletes from exploitation.

The sole reason—if any—to recognize the third proffered government interest, "competitive equality," as a substantial government interest could only be "on faith." Even so, it is hard to envision how a notice of Spring practice mailed to already enrolled students of Brentwood—simply as enrollees and without regard to their athletic prowess—is speech that in any respect threatens to undermine the interest of "competitive equality." The recipients' enrollment decision was not still hanging in the balance, nor (at least on this record) one that appeared wavering or at all unsettled. Whatever competitive advantage Brentwood may derive from that decision, or disadvantage that others may experience on the football field, that die was cast well before the coach's letter and phone calls and remained unaltered by notification of Spring practice. The TSSAA's punishment of Brentwood for these communications thus prohibits far more

speech than necessary to further the interest of "competitive equality," whatever may be the importance of that alleged state interest. It is, therefore, as constitutionally wanting under this "substantial government interest" argument as the other two and, as here applied, amounts to an unconstitutional interference with First Amendment rights that cannot stand.

Both the TSSAA and the Solicitor General urge this Court, notwithstanding, to leave such constitutional transgressions alone because to do otherwise is to drag the courts into second-guessing the day-to-day decisions of the TSSAA (and other such athletic associations) in the field of recruitment, as well as many other fields. While we are unconvinced that an "as applied" decision in this case will have such consequences, where a state actor undertakes to regulate speech in broad and ill-defined terms (such as "use of undue influence," or all persons "connected, or not connected," or "for athletic purposes"), it is all the more imperative for the courts to remain vigilant that discretion resting with the state actor charged with enforcement should not be exercised in a manner that needlessly encroaches on First Amendment rights.

Free speech is the first among our constitutional amendments and has been identified by this Court as the most important star in the galaxy of our basic freedoms. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."). Consequently, government interference, if allowed at all, is to be tolerated only in the most compelling of circumstances and only on the narrowest of terms necessary to serve legitimate, substantial

governmental interests. The courts' role as judicial watchdog in this area cannot be minimized; it stands as the last (and only) refuge against government erosion of First Amendment guarantees. This is no less true in the area of interscholastic athletics than in any other area. Thus, any suggestion that the TSSAA (or any other similar enforcement arm of a State) should have wide-ranging discretion to regulate in furtherance of an overarching government interest to insure that interscholastic academics are not athletically compromised, without judicial supervision over restrictions placed on speech, disserves the very purpose of the First Amendment, and cannot be countenanced. The Sixth Circuit decision must, therefore, be affirmed.

CONCLUSION

Respectfully, for the reasons stated above as well as those in Respondent's brief, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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No. 06-427

IN THE

Supreme Court of the United States

TENNESSEE SECONDARY SCHOOLS ATHLETIC ASSOCIATION,
Petitioner,

v.

BRENTWOOD ACADEMY,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF FOR *AMICUS CURIAE* THE TENNESSEE LAWYERS' ASSOCIATION FOR WOMEN IN SUPPORT OF RESPONDENT, BRENTWOOD ACADEMY

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INTEREST OF *AMICUS CURIAE*

The Tennessee Lawyers' Association for Women ("TLAW") is a nonprofit professional organization whose purposes include seeking equal protection of the law and promoting equality of opportunity for women. Its interest in this appeal is threefold.[1]

First, if the Tennessee Secondary Schools Athletic Association ("TSSAA") is not held to be a state actor, and its actions in governing high school athletics in Tennessee are not held to constitute state action, then women will be foreclosed from challenging the TSSAA's actions and decisions, or actions taken pursuant to its governance, on constitutional grounds, such as denial of First Amendment rights to free speech or freedom of association, or to equal protection or due process of law. Indeed, the TSSAA has done so in the past. If such actions or decisions occur, there may not be a statutory remedy. The right to challenge the actions of the TSSAA and its member schools on constitutional grounds must be preserved.

Second, the interests of the *schools* that are members of the TSSAA are represented in this Court. In addition, the interests of the *students* who participate in high school athletics, and their *families*, need to be underscored. While TLAW is not an official representative of those students and their families, it is appropriate for several points to be made on their behalf in order for this Court to gain perspective.

Third, TLAW asserts that participation in athletics is a beneficial way for young women to excel. Through athletics, they gain and strengthen many qualities which

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[1] The parties have consented to the filing of this *amicus* brief. Letters of consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, *amicus curiae* TLAW states that none of the parties or their counsel wrote this brief in whole or in part and that no one other than *amicus curiae* TLAW made any monetary contribution to the preparation or submission of this brief.

would serve them well if they should later enter the legal profession as lawyers, paraprofessionals, or support staff. These qualities include, among many others, leadership, perseverance, the ability to cooperate with others yet assert themselves, respect for authority, organizational and time management skills, and a sense of fair play. The legal profession benefits from counting among its numbers both professional and nonprofessional women who have participated in athletics during their youth.

SUMMARY OF THE ARGUMENT

Many cases have held that the TSSAA is a state actor, either based upon the premise that the TSSAA is a state actor, or affirmatively ruling that it is a state actor. There is no indication that the detailed facts recited by the District Court in its opinions in *Brentwood Academy v. TSSAA*, 13 F. Supp. 2d 670 (M. D. Tenn. 1998) and 304 F. Supp. 2d 981 (M.D. Tenn. 2003) have in any way changed over the years, except for the amendment of a rule adopted by the Tennessee Board of Education in 1995.

Education in Tennessee is guaranteed by the Tennessee Constitution. Title 49 of the Tennessee Code creates the Tennessee Department of Education and expressly contemplates that the Department has jurisdiction over private schools. The State Board of Education has adopted rules that implement its powers to govern all aspects of education, including the accreditation of private schools to certain detailed standards.

The Rules of the Board of Education also assert governance over secondary school interscholastic sports. This is accomplished through the TSSAA, with which the Board of Education has had a relationship for decades. In 1972, the Board enacted a rule designating the TSSAA as the body to govern secondary school interscholastic sports. In 1995, the Board amended the rule to "recognize" the TSSAA

as the body that governs secondary school sports, and to authorize schools to continue to belong to the TSSAA.

The TSSAA asks this Court to reconsider its holding in *Brentwood I*, 531 U.S. 288 (2001), that the TSSAA is a state actor. TLAW asserts that the Court in that case did not go beyond existing First Amendment jurisprudence, that the ruling is not confusing or difficult for lower courts to understand and apply, and should not be revisited or reversed.

TLAW also asserts that the Court should not apply government employee, government contractor, or recipient of funding cases to the relationship between the TSSAA and its member schools, including Brentwood Academy.

The TSSAA has not articulated a substantial state interest in its most recently-articulated justification for suppressing Brentwood Academy's truthful information to its admitted students. That alleged state interest is not sufficient to justify muzzling Brentwood Academy.

By contracting with the TSSAA to be regulated by it, and agreeing to follow its rules, Brentwood Academy did not waive its right to challenge unlawful or unconstitutional rules or actions of the TSSAA. Such a waiver would deny the First Amendment rights of students and families to receive truthful, accurate information. The people of Tennessee have a vital interest in information about education, in being involved with their children's education, and in educational choice. The contract between the TSSAA and its member schools does not amount to a waiver of the right to challenge. Any contract contains an implied condition of good faith and that the contract will be applied in such a way as to be legal and constitutional. The parties to this contract have unequal bargaining power and there is no way for member schools to negotiate for modifying the wording of this contract. If member schools are held to have waived their First Amendment rights, they have also waived their rights to challenge any other invalid or unconstitutional

action of the TSSAA, whether directed toward prospective students, contracted students, or enrolled students.

If the TSSAA prevails in this case, this will work to the detriment of women students in Tennessee. Sports and athletics are an important avenue through which women have the opportunity to excel and improve themselves physically and in many other ways. The rights and interests of women secondary school students in the state of Tennessee must be protected.

ARGUMENT

I. THE COURT SHOULD NOT REVERSE ITS RULING THAT THE TSSAA IS A STATE ACTOR.

A. The TSSAA Is a State Actor.

i. Court Decisions Since 1968 Have Treated the TSSAA as a State Actor; This Was a Settled Question Before *Brentwood I.*

Over years, in several federal court decisions, the TSSAA has been deemed a state actor. In several, the TSSAA did not even assert otherwise. Thus, constitutional requirements were either presumed to apply, or expressly held to apply. *Cape v. TSSAA*, 563 F.2d 793 (6th Cir. 1977) (TSSAA presumed to be state actor); *Graham v. TSSAA*, 1995 U.S. Dist. LEXIS 3211 (E.D.Tenn.1995), *appeal dismissed* (mootness), 107 F.3d 870 (Table), 1997 U.S. App. LEXIS 3490 (6th Cir.1997) (TSSAA held state actor under *Blum v. Yaretsky*, 457 U.S. 991 (1982)); *Crocker v. TSSAA*, 735 F. Supp. 753 (M.D. Tenn. 1990); *Carnes v. TSSAA*, 415 F. Supp. 569 (E.D. Tenn. 1976)(TSSAA presumed to be state actor; held that prohibiting girls from playing on a mixed high school baseball team was unconstitutional; determination did not stand or fall on whether or not it was

"designated" rather than "authorized" to govern interscholastic sports; TSSAA simply did, in fact, govern interscholastic sports); *Kelley v. Metropolitan County Board of Education*, 293 F. Supp. 485 (M.D. Tenn. 1968) (TSSAA held to be state actor, over its assertion, among other things, that it was a voluntary association).

ii. The 1995 Amendment to the Board of Education's Rule did not Change the TSSAA's Status as a State Actor.

The district court meticulously developed the overwhelming and undisputed evidence that the TSSAA is a state actor. *Brentwood Academy v. TSSAA*, 13 F. Supp. 2d 670, 673-685 (M.D. Tenn. 1998). Although the Sixth Circuit reversed that holding, *Brentwood Academy v. TSSAA*, 180 F.3d 758, 762 (6th Cir. 1999), the Sixth Circuit was itself reversed in *Brentwood I*, 531 U.S. 288 (2001).

After remand to the Sixth Circuit, 262 F.3d 543 (6th Cir. 2001) and thence to the district court for a lengthy trial, 304 F. Supp. 2d 981 (2003), it is even more convincing that the TSSAA is a state actor – the state in sheep's clothing.

The Sixth Circuit's 1999 opinion holding that the TSSAA was not a state actor was relied upon by the dissenting opinion in *Brentwood I*, 531 U.S. at 306. The Sixth Circuit omitted most of the district court's detailed findings, and recited few facts in support of its conclusion that the TSSAA is not a state actor. 180 F.3d 758, 762. The facts that it cited were entirely outweighed by the facts that it did not mention. The court of appeals considered that an amendment to a Board of Education ("Board") rule was almost dispositive, purporting to articulate the relationship between the Board and the TSSAA. The court said only that the former rule had been "repealed." *Id.* Actually, it was not repealed; it was simply amended.

The TSSAA has governed high school interscholastic sports for decades. 13 F. Supp. 2d at 675; 304 F. Supp. 2d 981. In 1972, the Board issued a rule that "designated" the TSSAA "the organization to supervise and regulate the athletic activities in which the public junior and senior high schools of Tennessee participate on an interscholastic basis." 13 F. Supp. 2d at 680.

In 1995, the Board amended the rule. The district court observed that this change was a shield to defend the TSSAA against just such litigation as this. *Id.* at 681. The new rule reads:

> The State Board of Education recognizes the value of participation in interscholastic athletics and the role of the Tennessee Secondary School Athletic Association in coordinating interscholastic athletic competition. The State Board of Education authorizes the public schools of the state to voluntarily maintain membership in the Tennessee Secondary School Athletic Association.

Id.

This was a distinction without a difference. There has been no meaningful change in the true relationship between, or operations of, the Board and the TSSAA, and the TSSAA still – obviously – "regulates" interscholastic high school sports.[2] Only the window dressing has been amended; the conduct has remained the same.

The Sixth Circuit did not consider *why* the 1972 rule was changed. The reason was as a shield against litigation. 13 F. Supp. 2d at 681. There is certainly no indication that

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[2] The prohibition at issue in this case is inconceivable if all the TSSAA does is "coordinate." The TSSAA's prohibition is, instead, a perfect example of "regulation" run amok, and shows that "coordinate" is merely a euphemism.

other factors listed by the Sixth Circuit in concluding that the TSSAA is not a state actor - e.g., expenses being paid out of gate receipts from games - have meaningfully changed since the 1972 rule was in effect.

This Court has held that the court considering whether state action exists must examine the actual facts, and not just the technical or legal relationship. *See, e.g., American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 54 (1999); *United States v. Virginia, infra; Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982); *Gilmore v. City of Montgomery*, 417 U.S. 556, 566 (1974); *Evans v. Newton*, 382 U.S. 296, 301 (1966).

The TSSAA waddles like a state actor and quacks like a state actor, and it should be held to be a state actor.

iii. The State of Tennessee in Fact Regulates Private Schools; Hence, Private Schools Are Integral to the TSSAA's Regulation of Sports.

The TSSAA posits that its regulation of private school participation in interscholastic sports is not part of its mission, as if its private school members were incidental to its real purpose, to regulate interscholastic sports for public schools. Of course, the overwhelming majority of TSSAA member schools are public. This does not make its governance of private schools any less a part of the entire Tennessee education system.

The TSSAA will always be dominated by public school officials because most of its members are public schools. Public school votes will always prevail. Mere private school *participation* cannot remove the cloak of state action from the TSSAA, since public *control* remains firmly in place.

Despite this, the state *does* regulate private schools in Tennessee, and has a substantial interest in doing so.

Tenn. Code Ann. Title 49 governs education in Tennessee. Tenn. Code Ann. § 49-1-201 sets forth the powers of the Commissioner - i.e., the Department - of Education. Section 49-1-201(c)(19) gives the Department of Education substantial powers over private schools:

> The commissioner shall provide direction through administrative and supervisory activities designed to build and maintain an effective organization as follows:
>
> . . .
>
> (19) Inspect, approve and classify such private schools of grades one (1) through twelve (12), as well as nursery schools and/or kindergartens, or any combination of these, as shall request such inspection, approval and classification; *provided, that the same standards as are used for the approval and classification of the public schools shall be used for such inspection, approval and classification*; . . .

[Emphasis added.]

Tenn. Code Ann. § 49-1-301 (1996) lists the powers and duties of the Board. Pursuant to § 49-1-301, the Rules of the Board contain Chapter 0520-7-1, pertaining to Administrative Rules for Non-Public Schools, and Chapter 0520-7-2, pertaining to Non-Public School Approval Process. Rule 0520-7-2-.01 divides non-public schools into categories.

Brentwood Academy's website states that it is accredited by, among other bodies, the Southern Association of Colleges and Schools. http://www.brentwoodacademy.com/page.cfm?p=27

As such, Brentwood Academy would be a Category III School under Rule 0520-7-2-.04. A Category III school is officially deemed to meet the requirement that it comply with the standards for public schools.

Also, it is significant that students can transfer between public and private schools without loss of credit for completed work. Tenn. Bd. of Ed. Rule 0520-7-1-.03.

The TSSAA's governance of athletics is part of a much larger whole and is an application of the overarching authority and responsibility of the State Board of Education. That is the context in which this Court must assess the TSSAA's governance as state action.

The Board of Education is acting through the TSSAA. Without the TSSAA, the Board would be regulating interscholastic sports. This answers the questions, "Is the TSSAA acting under color of state law?" and "Are the actions of the TSSAA fairly attributable to the state?"

B. *Brentwood I* Did Not Depart From Existing Law.

The TSSAA asks this Court to reverse *Brentwood I*, arguing that the holding is a departure from prior constitutional analysis and will be confusing to lower courts.

TLAW adopts the persuasive argument in the *amicus* brief (at pages 11-17) of the National Women's Law Center, in which TLAW has joined, that the standard discussed in *Brentwood I* is not confusing or unworkable.

Brentwood I simply stands for the fact that determining whether an entity is a state actor requires a case-by-case, fact-intensive analysis. The term "entwinement" is shorthand for the real question – as § 1983 says, is the action under color of state law? "Although we have used many different tests to identify state action, they all have a common purpose. Our goal in every case is to determine

whether an action 'can fairly be attributed to the State.' *Blum v. Yaretsky, 457 U.S. 991, 1004, 73 L. Ed. 2d 534, 102 S. Ct. 2777 (1982); American Mfrs., supra, at 52.*" *Brentwood I*, 531 U.S. 288 at 305, *et seq.*

"Entwinement" is but one more word in the lexicon that the courts have used to encapsulate the oceans of printer's ink and toner cartridges that have been used, from this Court to local trial courts, in analyzing how to tell when an entity is a state actor. It is not a magic word or a new and separate test. Other plain-English words that distill these concepts include "symbiosis," "pervasive," "connections," "intertwinement," "nexus," and "involvement." They are handy, pithy and succinct, but each of them is not its own separate test for state action.

The district court discussed the concept of "intertwinement" in its 1998 decision: "In Clark and St. Augustine,[3] the cases cited by the Supreme Court in Tarkanian, the courts listed numerous factors which indicated that the association's functions were 'intertwined' with the state's actions." 13 F. Supp. 2d at 683.

We also must not ignore *Tarkanian*[4] itself, and its famous footnote 13.

> The situation would, *of course*, be different if the membership consisted entirely of institutions located within the same State, many of them public institutions created by the same sovereign. See *Clark v. Arizona Interscholastic Association* [citation omitted]; *Louisiana High School Athletic Association* v. *St. Augustine High School* [citation omitted].

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[3] *Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126 (9th Cir. 1982), cert. denied, 464 U.S. 818 (1983); *Louisiana High School Athletic Ass'n v. St. Augustine High School*, 396 F.2d 224 (5th Cir. 1968).

[4] *Nat'l Collegiate Ath. Ass'n v. Tarkanian*, 488 U.S. 179 (1988)

> The dissent apparently agrees that the NCAA was not acting under color of state law in its relationships with private universities, which constitute the bulk of its membership. See *post*, at 202, n. 2.

488 U.S. at 194 [emphasis added].

The TSSAA tries to convince the Court that the analysis in *Brentwood I* is so complicated that other courts cannot understand how to do it. On the contrary, it is a typical case-by-case, fact-intensive analysis, which courts are quite capable of performing. As this Court observed in *Tarkanian*,

> "Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law" and avoids the imposition of responsibility on a State for conduct it could not control. *Lugar*, 457 U.S., at 936-937, 102 S. Ct. at 2753-2754. When Congress enacted [42 U.S.C.] § 1983 as the statutory remedy for violations of the Constitution, it specified that the conduct at issue must have occurred "under color of" state law; thus, liability attaches only to those wrongdoers "who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it." *Monroe v. Pape*, 365 U.S. 167, 172, 81 S. Ct. 473, 476, 5 L. Ed. 2d 492 (1961). As we stated in *United States v. Classic*, 313 U.S. 299, 326, 61 S. Ct. 1031, 1043, 85 L. Ed. 1368 (1941): "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."

> . . .
>
> In the typical case raising a state-action issue, a private party has taken the decisive step that caused the harm to the plaintiff, and the question is whether the State was sufficiently involved to treat that decisive conduct as state action. This may occur if the State creates the legal framework governing the conduct, e.g., *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975); if it delegates its authority to the private actor, e.g., *West v. Atkins*, 487 U.S. 42, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988); or sometimes if it knowingly accepts the benefits derived from unconstitutional behavior, e.g., *Burton v. Wilmington Parking Authority*, *supra*. Thus, in the usual case we ask whether the State provided a mantle of authority that enhanced the power of the harm-causing individual actor.

488 U.S. at 191-192.

II. THE COURT SHOULD NOT DEPART FROM EXISTING LAW BY TREATING MEMBER SCHOOLS AS EMPLOYEES, CONTRACTORS OR RECIPIENTS OF GOVERNMENT FUNDS.

The TSSAA suggests that the Court departed from existing law in determining that the TSSAA is sufficiently entwined with the state of Tennessee to constitute a state actor – which the Court did not do.

On the other hand, the TSSAA wants the Court to adopt an entirely new standard - the employee or contractor or receiver of funds standard - for limiting the First Amendment rights of its member schools. This would be a sweeping and unprecedented departure from existing law, and one which is completely unjustified and unwarranted.

Brentwood Academy is nothing like an employee of the TSSAA. The *Pickering*[5] line of cases does not apply either directly or by analogy.

Further, the communication that Brentwood Academy issued was not critical, let alone defamatory, about the TSSAA, as was the teacher's communication, critical of a taxing authority, in *Pickering*. It was a truthful statement of information imparting knowledge which the recipients were entitled to receive and act upon.[6]

The TSSAA may be able to limit the First Amendment rights of its *own* employees, but it cannot limit the First Amendment rights of a third party that contracts to be regulated by it.

Brentwood Academy is not a government contractor with the TSSAA. Hence, the *Umbehr*[7] line of cases does not apply. The TSSAA does not perform some service for the TSSAA such as building an office, designing computer software, providing a copy machine or office supplies. The TSSAA does not pay its member schools for delivering goods or services to the TSSAA.

The nature of the contract is for the member schools to be regulated.

The Sixth Circuit's opinion in this case at 442 F.3d 410 (6th Cir. 2006) points out that the TSSAA did not raise a government employee or contractor argument in the original district court case, the first Sixth Circuit appeal, the Supreme Court, the Sixth Circuit after remand, or the district court at trial after remand. The TSSAA waited until the appeal came before the Sixth Circuit for the fourth time (not counting

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[5] *Pickering v. Board of Education of Township High School District 206, Will County*, 391 U.S. 563 (1968)

[6] For a recent Tennessee case on this exact subject, see *Jackson v. Shelby County Civil Service Merit Board*, 2007 Tenn. App. LEXIS 18 (2007). Plaintiff was a county employee fired for distributing untrue campaign literature, not for exercising his First Amendment right to protest.

[7] *Board of County Commissioners, Wabaunsee County, Kansas v. Umbehr*, 518 U.S. 668 (1996)

rehearings) to raise the *Pickering/Umbehr* argument. The circuit court noted:

> We thus reject the defendants' attempt to reshape the framework through which we view this case -- a framework set out by this court previously and utilized by the district court in trying the case. The TSSAA, in administering its rules and regulations and imposing penalties against member schools, acts as a regulator, not as an employer, contractor, or disburser of funds. Therefore, as this court has previously concluded, Brentwood's First Amendment rights are at issue in this case, and intermediate scrutiny applies to the TSSAA's application and enforcement of the recruiting rule.

442 F.3d at 424.

Finally, the public funding analogy does not apply. Recipients of public funding retain their constitutional rights so long as they spend the government's largesse according to the requirements of the funding. *See* Respondent's Brief at 36, *et seq*.

In this case, the TSSAA is not even providing public funding to the TSSAA. The TSSAA is not providing any sort of special benefit. It is pervasively regulating a significant aspect of the entire education system of the state of Tennessee, and certainly a significant aspect of the educational lives of the students who have committed to attend Brentwood Academy and their families – interscholastic sports.

The TSSAA cannot be allowed to prohibit speech that consists of truthful information to which the recipient is entitled. This is the reverse of at least some of the public funding cases, where the activity that the government

decides not to fund is arguably injurious or at least controversial, such as using government funds to discuss abortion. In the case of funding, the government is providing money for a purpose and is saying that the money must be used for that purpose. In this case, the government is directly muzzling a school and deliberately keeping young students and their families in ignorance about positive, salutary information and opportunities.

III. THE TSSAA HAS NOT ARTICULATED A SUBSTANTIAL STATE INTEREST IN "COMPETITIVE EQUITY," AND HAS NOT NARROWLY TAILORED THE RECRUTING RULE IN ORDER TO PASS CONSTITUTIONAL MUSTER.

In the original district court decision on cross motions for summary judgment, the TSSAA asserted two state interests in support of its prohibition against Brentwood Academy's communication, 13 F. Supp. 2d at 688:

One was in preventing exploitation of children. It is agreed that this is a significant state interest that supports the existence of *a* recruiting rule prohibiting undue influence.

The second was in balancing sports and academics. After remand, the TSSAA articulated an interest that was not consistent with the original interest: At that point, it asserted that the second state interest was in subordinating sports to academics. 304 F. Supp. 2d at 984.

Whichever version of this second interest we use, it does not justify squelching the flow of truthful information to people entitled to receive it and act upon it. Withholding this information from some people while providing similar information to others, or to these same people, that relates to some other extracurricular activity, makes no sense and cannot rise to the level of being a substantial state interest. Indeed, this information is not even within the realm of "recruiting." It is not "influencing" anyone to do anything

within the contemplation of the rule, because the recipient has already contracted to attend the school in question.[8]

Even though the subordination theory has been accepted as valid, TLAW respectfully contends that it has lost credibility because it has been stated different ways, and is in conflict with the newly-stated "competitive equity" rationale.

After remand, the TSSAA also devised a new, third theory: that the rule is to result in a "level playing field," or "competitive equity," so that any given school has a reasonable chance to win games. *Id.*

TLAW respectfully asserts that the district and circuit courts' refusal to countenance the third justification should be affirmed, for several reasons.

First, it is too little, too late. It was not used below, and it has obviously been thought of only after the fact.

Second, although TLAW acknowledges that there is evidence in support of that asserted state interest, the TSSAA could not show that it ever really was an interest that explained the existence of the recruiting rule. In *United States v. Virginia*, 518 U.S. 515 (1996) (hereinafter, "VMI Case"), the Court found that one of Virginia's articulated state interests in keeping VMI all male had never actually been used as a reason. Although TLAW agrees with the dissent in that case that an entity does not need to keep a phalanx of lawyers on hand at all times to think up justifications for statutes and rules, nevertheless, when a statute or rule has been enacted, there must have been a reason. The reason may evolve over time, but there must still be some valid reason, not arising out of the litigation itself, that explains why it is needed. Even if one does not

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[8] The TSSAA argues that a student might not actually matriculate at the school the following August or September. If that is a point in anyone's favor, it supports the proposition that the communication was not "undue influence," because whatever influence it had was not sufficient to result in the student's actually attending the school.

agree that VMI should have been required to admit women, the case stands for that separate proposition. "The justification must be genuine, not hypothesized or invented post hoc in response to litigation." *Id.* at 516.

Third, this rationale contradicts the other two articulated state interests. If the students' best interests are paramount, then the rule cannot be justified for a reason that places the interests and the pride of the schools ahead of the interests of the students.

Fourth, the "competitive equity" rationale is too nebulous to articulate and therefore does not rise to the level of a substantial state interest: Does it only preserve equity between the punished school and the schools that that school plays in interscholastic sports? Does it preserve equity between Brentwood Academy and a school located in Memphis or Knoxville? Does it preserve equity between Brentwood Academy and all public schools? Between Brentwood Academy and public schools of comparable size? Between Brentwood Academy and other nonpublic schools? How can the state ever hope to establish competitve equity between large public schools and schools in poor rural counties? What if a school is a powerhouse in football, but is perenially in the doghouse in basketball, baseball, track, swimming and gymnastics? Is the recruiting rule analyzed sport by sport, so that it is violated if the punished school is good in that sport but not if the forbidden communication pertains to a sport in which the school habitually loses? What if the letter in this case had been sent by a coach at a small rural school that rarely wins anyway – are we really to believe that the TSSAA would have punished that school, especially since the TSSAA's own testimony was that "the interpretive commentary is not a binding interpretation of the Recruiting Rule and that the Executive Director and the Board of Control have the discretion to disregard the interpretive commentary" (*id.* at 986)?

Fifth, it is not credible. One purpose for athletics is to teach about life, and to be strong and tough and meet challenges. That belies the testimony that posited that students must not become discouraged or they will lose heart; that, for a student to be willing to play, he/she must have a reasonable chance to win. If that is what the schools are teaching students, they are being poorly prepared for real life.

Besides, the TSSAA has taken valid steps to further the objective of competitive equity - such as dividing schools into divisions - which do not, and need not, impinge on First Amendment rights. These are described in Brentwood Academy's Brief at 14, n. 19. The TSSAA cannot impede the flow of truthful information to people who are entitled to receive it, on the grounds of competitive equity.

IV. THE COURT MUST HOLD THAT THE CONTRACT WITH TSSAA DID NOT WAIVE THE RIGHT TO CHALLENGE THE RULES, IN ORDER TO ASSURE THAT WOMEN STUDENTS WILL BE AFFORDED THEIR CONSTITUTIONAL RIGHTS.

A. The TSSAA's Action Against a School Punishes the Students and Families and Denies Their Constitutional Rights.

The TSSAA governs high school sports. It can require schools, i.e., coaches, students, and school administrators, to do and not to do certain things. It can punish them if they disobey.

Brentwood Academy, or any school, public or private, may be a legal entity, and it may be bricks and mortar and turf and bleachers and goalposts, but its *raison d'être* is to provide an education and protect the interests of its students. A school does not exist as an end unto itself, but to serve the students, their families and the community.

Athletics must be looked at in that context. Excellence in athletics is not the only kind of excellence to which schools and students aspire. All schools want to turn out National Merit Scholars, science fair winners, Model UN participants, and Quiz Bowl, Latin and debate champions. All these are educational functions, even though it could not be said that a student has a constitutional right to participate in any particular one.

It is the students who are harmed by TSSAA's imposition of sanctions or unconstitutional rules. The district court pointed this out in its 1998 opinion, that "listeners, as well as speakers, have First Amendment interests that deserve protection, interests that may be asserted by those who wish to reach those listeners," 13 F. Supp. 2d at 690, n. 19, citing *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

In *Virginia Board of Pharmacy*, this Court addressed whether the public had a First Amendment right to receive factual information about the prices for which pharmacies sold medicines. The information itself had a commercial character, but the Court said,

> If there is a kind of commercial speech that lacks all First Amendment protection, therefore, it must be distinguished by its content. Yet the speech whose content deprives it of protection cannot simply be speech on a commercial subject. No one would contend that our pharmacist may be prevented from being heard on the subject of whether, in general, pharmaceutical prices should be regulated, or their advertisement forbidden. Nor can it be dispositive that a commercial advertisement is noneditorial, and merely reports a fact. Purely factual

> matter of public interest may claim protection. *Bigelow v. Virginia, 421 U.S., at 822; Thornhill v. Alabama, 310 U.S. 88, 102 (1940).*
>
> . . . .
>
> As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate. Appellees' case in this respect is a convincing one. Those whom the suppression of prescription drug price information hits the hardest are the poor, the sick, and particularly the aged. A disproportionate amount of their income tends to be spent on prescription drugs; yet they are the least able to learn, by shopping from pharmacist to pharmacist, where their scarce dollars are best spent. When drug prices vary as strikingly as they do, information as to who is charging what becomes more than a convenience. It could mean the alleviation of physical pain or the enjoyment of basic necessities.

Id. at 761-764 [footnote omitted].

Even though the letter that Brentwood Academy sent to its admitted students was not commercial speech, *Virginia Board of Pharmacy* is highly relevant. The admitted students had a vital interest in knowing that spring football practice was going to take place and that they could attend.

Virginia Board of Pharmacy also points out that the state should not dictate what factual information a member

of the public is entitled to know. Thus, contracted Brentwood Academy students and their families are entitled to truthful, correct information and are not so stupid, gullible or impressionable that they cannot react rationally.

It also points out that the Court will actually weigh and assess the asserted state interest in keeping factual information from the public. *Id.* at 769.

While the case at bar is not precisely about *competition* (which is no longer really relevant since the student has contracted to attend Brentwood Academy), it *is* about *information*, and therefore it is highly applicable here.

Another case that is very persuasive, although it dealt with commercial speech, is *Greater New Orleans Broadcasting Ass'n v. U. S.*, 527 U.S. 173 (1999). The facts are analogous from the perspective of the recipient of the factual, truthful information. The activity in question was legal; hence, the information that the would-be advertisers sought to publish was factual and legal. The recipients of the information were entitled to receive that information and gamble if they wished to do so.

This Court held that two prongs of the test of *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y.*, 447 U.S. 557 (1980) - whether the regulation directly advanced the governmental interest asserted and whether the regulation was not more extensive than necessary to serve that interest - were not met. *Id.* at 184-195. The Government bears the burden of identifying a substantial interest and justifying the challenged restriction. *Id.* at 183. The ban against broadcasting the information "sacrifices an intolerable amount of truthful speech about lawful conduct when compared to the diverse policies at stake and the social ills that one could reasonably hope such a ban to eliminate." *Id.* at 194.

Chief Justice Rehnquist, concurring, pointed out that there were non-speech-related measures that could be taken to assist in furthering the articulated governmental interests.

Id. at 196. The same is quite true in the case at bar, see, e.g., Brentwood Academy's Brief at 14, n. 19.

Justice Thomas, also concurring in *Greater New Orleans*, stated:

> I continue to adhere to my view that "in cases such as this, in which the government's asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace," the *Central Hudson* test should not be applied because "such an 'interest' is *per se* illegitimate and can no more justify regulation of 'commercial speech' than it can justify regulation of 'noncommercial' speech." *44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 518, 134 L. Ed. 2d 711, 116 S. Ct. 1495 (1996)* (concurring in part and concurring in the judgment). Accordingly, I concur only in the judgment.

Id. at 197. The same underlying philosophy applies to this case at bar, regardless of whether or not Brentwood Academy's prohibited speech is commercial speech.

So, the TSSAA's gag on Brentwood Academy must be tested from the perspective of the students and families as much as from the perspective of Brentwood Academy.

An incoming student and her family want to know about their new school. She wants to know what activities will be open to her. She and her family are not privy to the supposed distinction between the TSSAA and the Tennessee Board of Education - to the student and her family, it is all one big educational opportunity.

The student does not care whether the information is about the tennis or basketball team, which are governed by the State Board of Education through the TSSAA - or whether it is about the Drama Club or the Debate Club,

which are governed only by the school. Yet, according to the TSSAA, sports are subordinate to academics, so the student is entitled to information about arts and academics, but must be kept in ignorance about sports.

This obviously works to the detriment not only of students who are already proficient at a sport, but of those who are novices.

To allow the TSSAA to squelch the kind of information at issue here makes no sense as applied to students and families. The truth is that the students have been damaged and discriminated against by the paternalistic rules of the TSSAA. Any student who does not receive direct communication of factual, truthful information from a school that she has contracted to attend, would have good reason to be disappointed in the school and to feel that the school had neglected its responsibility.

For an additional discussion of the recipient's First Amendment right to truthful information, see Respondent's Brief at 19.

If admitted students and their families have a First Amendment right to the truthful information about spring practice, Brentwood Academy cannot waive that right on their behalf, even if it could be said to have waived its own First Amendment right, which, as has been shown in Brentwood Academy's brief, it has not.

B. The Public Has a Vital Interest in Information About Education.

That the rights and interests of the listeners, the recipients of the information, are vital is borne out by the fact that 117 bills on the subject of education have been introduced in the Tennessee House of Representatives, and 116 have been introduced in the Senate, in the 2007 session of the Tennessee General Assembly. http://www.legislature.state.tn.us/bills/currentga/asp/websubjectin

dex/BillsBySubject.aspx?Primarysubject=1520&Chamber=B. Several illustrate the interest of the public and parents on the subject of information and choice:

House Bill 795 ("HB"), Senate Bill 687 ("SB"), and HB 1227, SB 705, provide for scholarships for their students to attend private schools. http://www.legislature.state.tn.us/bills/currentga/BILL/HB0795.pdf; http://www.legislature.state.tn.us/bills/currentga/BILL/HB1227.pdf.

HB 873, SB 287 provide that the TSSAA must require persons applying to be referees to provide fingerprints and submit to a criminal background check. http://www.legislature.state.tn.us/bills/currentga/BILL/HB0873.pdf

HB 875, SB 1019 create a Professional Standards Commission to assume all duties of the Board of Education, and work under the Commissioner of Education, with respect to the licensure of public school teachers, which includes all state personnel required to be licensed. http://www.legislature.state.tn.us/bills/currentga/BILL/HB0875.pdf. (The record reflects that this includes coaches at TSSAA schools.)

HB 905, SB 1133 require schools to notify parents of specific information about school clubs and organizations, and require parental consent to participate in a club. http://www.legislature.state.tn.us/bills/currentga/BILL/HB0905.pdf

HB 1419, SB 1959 restrict universal mental health testing, or psychiatric or socioemotional screening, of children and require parental consent. http://www.legislature.state.tn.us/bills/currentga/BILL/HB1419.pdf.

HB 1943, SB 2162 expand opportunities for parental involvement in public schools. http://www.legislature.state.tn.us/bills/currentga/BILL/HB1943.pdf

V. MEMBER SCHOOLS HAVE NOT CONTRACTUALLY WAIVED THEIR RIGHTS TO CHALLENGE UNLAWFUL OR UNCONSTITUTIONAL ACTS OF THE TSSAA.

The TSSAA has raised an argument that was never discussed in the original district court opinion dealing with the TSSAA's own motion for summary judgment. That is that by joining the TSSAA and agreeing to follow its rules, member schools have waived their rights to challenge unlawful or unconstitutional actions of the TSSAA.

Brentwood Academy and other *amici* have thoroughly discussed the waiver issue, and TLAW adopts their arguments.

If the TSSAA is correct, the waiver applies to any member of the TSSAA, and permits the TSSAA to adopt any unlawful or unconstitutional act or rule that is wishes, as a matter of law. If the TSSAA is correct, no public or private school could ever raise a challenge.

The TSSAA also argues that if a school does not like its rules, it should simply resign its membership.

The TSSAA is the only viable means through which schools can participate in interscholastic sports in Tennessee. If a school resigns from the TSSAA, its students and their families are denied all of the opportunities and benefits associated not only with participating in interscholastic sports, but also in attending such events. The athletes themselves are denied the benefits of participating on the high school level. Beyond that, they are also denied the possibility of being awarded future scholarships and opportunities at the college level, and for the educational and intellectual growth that attending college means. In turn, they may be denied the only avenue they have to opportunities in adulthood for career success. Leaving the TSSAA is not a viable option. A school should not have to make the impossible choice of either tolerating an unlawful

or unconstitutional rule or not being able to participate in interscholastic sports in a meaningful manner.[9]

The TSSAA contract truly is one-sided. The parties do not have even bargaining power. The TSSAA has the force of the State of Tennessee behind it. It presents its contract and its rules as a "take it or leave it" proposition.

Thus, this case is glaringly different from *D. H. Overmyer Co., Inc. v. Frick Co.*, 405 U.S. 174 (1971), where there was true bargaining power. Instead, this case is much more like *Fuentes v. Shevin*, 407 U.S. 67 (1972), in which an individual of limited means had purchased furniture under a form contract that allowed for replevin without any notice or hearing. The Court noted the unequal bargaining power between the purchaser and the seller. *Id.* at 95.

If Brentwood Academy were not a member of the TSSAA, it surely would not be in a able to challenge the constitutionality of an action of the TSSAA.

The logical conclusion of TSSAA's position is that no one can ever challenge the validity or constitutionality of its rules. A nonmember school cannot, and a member school cannot.

This case is not just about the First Amendment right of one member school to communicate truthful information that the students and families are entitled to have, or the due process by which a school is punished. If Brentwood Academy has waived the right to challenge this rule on these grounds, no one can ever challenge any TSSAA rule or action on any ground, including grounds such as racial or gender discrimination. Minorities and women could be discriminated against with impunity. If being a member

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[9] The Court has held in other contexts that one should not have to make such a choice – either knuckle under or get out. For example, in *Dunn v. Blumstein*, 405 U.S. 330 (1972), although a person's move to Tennessee from another state had been voluntary, the durational residency requirement that had to be met under Tennessee law in order to register to vote was unconstitutional.

precludes a challenge to constitutionality, it precludes a claim that a statute has been violated – waiver is waiver.

Also, this case is not just about the rules of the TSSAA as applied to prospective students or contracted students. If the TSSAA is correct that its member schools have waived their right to protest unlawful or unconstitutional acts, the waiver also applies to students who are actually enrolled in and attending a member school.

Obviously, this case is a matter of public interest, contrary to the contention of the TSSAA. It is certainly a matter of concern to women students and their families.

The TSSAA–Brentwood Academy contract is a Tennessee contract and is therefore subject to general Tennessee contract law. In every contract, there is an implied term of good faith and fair dealing. A contract will be interpreted in a manner that is lawful. If the contract could be interpreted in a way that a reasonable person would be likely to have agreed to, it will be so interpreted, rather than in a way that a reasonable person would be unlikely to have agreed to. *See* TENN. JUR., Contracts, §§ 49-50.

The contract with the TSSAA contained an implied condition that the member must only do so if the rules are lawful, constitutional, fair, reasonable, understandable, and consistently applied. It should not be construed such that any member school has agreed to submit itself, its students and their families to whatever unconstitutional whim might occur to those in control of the TSSAA.

TLAW has joined in the brief of *amicus curiae* the National Women's Law Center. That brief contains a superlative discussion of the authorities on the subject of the importance and benefit to young women of participating in sports, for their characters, their physical and emotional well-being, and their future educational and career opportunities, among others. *See* National Women's Law Center Brief at 21, *et seq*. TLAW adopts and incorporates that discussion herein by reference.

See, also, United States v. Virginia, 518 U.S. 515 (1996), which discussed the intangible benefits to young women of certain kinds of extracurricular activity and training, and held that these should be made available to young women as well as to young men.

Finally, by enacting Title IX, Congress enunciated the public policy that women shall be treated fairly in their access to athletic opportunities. Congress went as far as it could go in requiring sports programs at facilities that receive federal money, to assure women this access.

The TSSAA's history of arbitrary and even punitive action is well established. TLAW respectfully begs this Court not to consider this case in a vacuum, but rather to be cognizant of the TSSAA's pattern of behavior.

In *Crocker v. TSSAA*, 735 F. Supp. 753 (M.D. Tenn. 1990), a student with a learning disability transferred to McGavock High School, a public school in Nashville, and wanted to play football. The District Court ordered that he be allowed to play. The TSSAA had to be enjoined from stripping the school of its wins and trophies for complying with the court order. It is interesting to note that, after the litigation was concluded, the student lost his case, and the only remnant of the original case that still stood was the ruling that the TSSAA could not strip McGavock of its wins and trophies. *Crocker v. TSSAA*, 47 F.3d 1168 (Table), 1995 WL 14108 (6th Cir, 1995).

In *Kelley v. Metropolitan County Board of Education of Nashville and Davidson County*, 293 F. Supp. 485 (M.D. Tenn. 1968), the TSSAA had denied an all-black school its due process rights by suspending it for a year without setting preexisting standards and without a formal charge. In *Cape v. TSSAA*, 563 F.2d 793 (6th Cir. 1977) and *Carnes v. TSSAA*, 415 F. Supp. 569 (E.D. Tenn. 1976), the courts addressed the TSSAA's requirement that girls play basketball under different rules from boys, which allegedly made it impossible for girls in Tennessee to qualify for college

basketball scholarships. *Cape* pointed out, 563 F.2d at 794-795, that Tennessee was one of the last five states to require women to play under the old rules.

The most likely forms of discrimination if the TSSAA is not a state actor - or if the schools have waived the right to challenge illegal or unconstitutional rules simply by having joined - will be gender and racial discrimination, or at least discrimination that unfairly burdens and discriminates against female athletes. TLAW respectfully asserts that this Court should be conscious of this and vigilant to protect against this outcome. As it has shown by past behavior, TLAW's concern is not merely hypothetical.

It would be anomalous if the TSSAA, whose conduct, and whose relationship to the Board of Education, are so similar to those described generally in the numerous cases finding that state athletic associations were state actors, succeeded in evading constitutional consequences because of mere semantics – the amendment of the Board of Education's administrative rule "recognizing" the TSSAA.

If this Court reverses its holding that the TSSAA is a state actor or holds that the member schools contract away their rights to challenge unlawful actions, Tennessee and other states have clever people who will use the TSSAA as a template. The constitutional rights of students, and the progress that women athletes have made, will begin eroding before the ink is dry on this Court's opinion.

If the TSSAA prevails, the Board and the TSSAA are entirely likely, based on their past conduct, to engage in a pervasive pattern of unconstitutional discrimination and denial of women's and other athletes' First Amendment, equal protection, due process, and other constitutional rights that are guaranteed to them as part of their right to an education and the state's duty to educate them.

CONCLUSION

For the foregoing reasons, *amicus curiae* The Tennessee Lawyers' Association for Women respectfully requests that this Court reiterate the holding that the TSSAA is a state actor; affirm the ruling of the court below that the TSSAA's conduct violated the First Amendment of the United States Constitution; and rule that a Tennessee secondary school, by contracting to be a member of the TSSAA and to follow its rules, does not give up its rights, and that of its students and their families, to challenge the validity or constitutionality of one of those rules.

Respectfully submitted,

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